All will agree that this is the enunciation of a true principle, and it is only by a wise and forbearing application of it that the operation of the powers and functions of the two Governments can be harmonized. Their powers are so intimately blended and connected that it is impossible to define or fix the limit of the one without at the same time that of the other in respect to any one of the great departments of Government. When the limit is ascertained and fixed, all perplexity and confusion disappear. Each is sovereign and independent in its sphere of action, and exempt from the interference or control of the other, either in the means employed or functions exercised, and influenced by a public and patriotic spirit on both sides, a conflict of authority need not occur or be feared.

Judgment of the Court below is reversed:*

THE BRIG AMY WARWICK.

THE SCHOONER CRENSHAW.

THE BARQUE HIAWATHA.

THE SCHOONER BRILLIANTE.

1 Neutrals may question the existence of a blockade, and challenge the legal authority of the party which has undertaken to establish it.

2 One belligerent, engaged in actual war, has a right to blockade the ports of the other, and neutrals are bound to respect that right.

3 To justify the exercise of this right, and legalize the capture of a neutral vessel for violating it, a state of actual war must exist, and the neutral must have knowledge or notice that it is the intention of one belligerent to blockade the ports of the other.

* The case of *The Bank of the Commonwealth* vs. *The Commissioner of Taxes*, was also heard at this term. The record raised precisely the same questions as that in the *Bank of Commerce* vs. *New York City*, and the cases were decided in the same way for the same reasons. It was argued by Mr. Bradford of New York, for the Bank, and by Mr. Brady and Mr. Develin, of New York, *contra*.

4. To create this and other belligerent rights, as against neutrals, it is not necessary that the party claiming them should be at war with a separate and independent power: the parties to a civil war are in the same predicament as two nations who engage in a contest and have recourse to arms.

5 A state of actual war may exist without any formal declaration of it by either party; and this is true of both a civil and a foreign war.

6. A civil war exists, and may be prosecuted on the same footing as if those opposing the Government were foreign invaders, whenever the regular course of justice is interrupted by revolt, rebellion, or insurrection, so that the Courts cannot be kept open.

7 The present civil war between the United States and the so-called Confederate States, has such character and magnitude as to give the United States the same rights and powers which they might exercise in the case of a national or foreign war; and they have, therefore, the right *jure bello* to institute a blockade of any ports in possession of the rebellious States.

8. The proclamation of blockade by the President is of itself conclusive evidence that a state of war existed, which demanded and authorized recourse to such a measure.

9. All persons residing within the territory occupied by the hostile party in this contest, are liable to be treated as enemies, though not foreigners.

10. It is a settled rule, that a vessel in a blockaded port is presumed to have notice of a blockade as soon as it commences.

11. The proclamation of blockade having allowed fifteen days for neutrals to leave, a vessel which overstays the time is liable to capture although she was prevented by accident from getting out sooner.

12 To make a capture lawful, it is not necessary that a warning of the blockade should have been previously endorsed on the register of the captured vessel.

These were cases in which the vessels named, together with their cargoes, were severally captured and brought in as prizes by public ships of the United States. The libels were filed by

the proper District Attorneys, on behalf of the United States and on behalf of the officers and crews of the ships, by which the captures were respectively made. In each case the District Court pronounced a decree of condemnation, from which the claimants took an appeal.

The *Amy Warwick* was a merchant vessel, and belonged to Richmond. Her registered owners were David and William Currie, Abraham Warwick and George W. Allen, who resided at that place. Previous to her capture she had made a voyage from New York to Richmond, and thence to Rio de Janeiro, Brazil. At the last named port she shipped a cargo of coffee 5,100 bags, to be delivered at New York, Philadelphia, Baltimore or Richmond, according to the orders which the master would receive at Hampton Roads. She was on her voyage from Rio to Hampton Roads and off Cape Henry when she was captured (July 10th, 1861) by the Quaker City. At the time of the capture the barque was sailing under American colors, and her commander was ignorant of the war. The Quaker City carried her into Boston, where she was libelled as enemy's property. The claimants of the vessel were the persons already named as owners. James Dunlap, Robert Edmonds, John L. Phipps, and Charles Brown claimed the cargo. The claimants in their several answers denied any hostility on their part to the Government or Laws of the United States, averred that the master was ignorant of any blockade, embargo or other interdiction of commerce with the ports of Virginia, and asserted generally that the capture was unlawful.

The *Crenshaw* was captured by the United States Steamer *Star*, at the mouth of James River, on the 17th of May, 1861. She was bound for Liverpool with a cargo of tobacco from Richmond, and was owned by David and William Currie, who admitted the existence of an insurrection in Virginia against the Laws and Government of the United States, but averred that they were innocent of it. The claimants of the cargo made similar answers, and all the claimants asserted that they had no such notice of the blockade as rendered the vessel or cargo liable to seizure for leaving the port of Richmond at the time

when the voyage was commenced. She was condemned as prize on the ground that she had broken, or was attempting to break, the blockade at the time of her capture.

The *Hiawatha* was a British barque, and was on her voyage from Richmond to Liverpool with a cargo of tobacco. She left Richmond on the 17th of May, 1861, and was captured in Hampton Roads on the 20th by the Minnesota, and taken to New York. Her owners were Miller, Massman & Co., of Liverpool, who denied her liability to capture and condemnation on the ground that no sufficient notice had been given of the blockade. The claimants of the cargo put their right to restoration upon a similar basis.

The *Brilliante* was a Mexican schooner, owned by Rafael Preciat and Julian Gual, residents of Campeche. She had on board a cargo of flour, part of which was owned by the owners of the vessel, and part by the Señores Ybana & Donde, who were also Mexican citizens. She had a regular clearance at Campeche for New Orleans, and had made the voyage between those ports. At New Orleans she took in her cargo of flour, part to be delivered at Sisal and part at Campeche, and took a clearance for both those places. On her homeward voyage she anchored in Biloxi Bay, intending to communicate with some vessel of the blockading fleet and get a permit to go to sea, and while so at anchor she was taken by two boats sent off from the Massachusetts. She was carried into Key West, where the legal proceedings against her were prosecuted in the District Court of the United States for the District of Florida.

The minuter circumstances of each case, and the points of fact, as well as law, on which all the cases turned, in this Court and in the Court below, are set forth with such precision in the opinions of both Mr. Justice Grier and Mr. Justice Nelson, that more than the brief narrative above given does not seem to be necessary.

The case of the *Amy Warwick* was argued by *Mr. Dana*, of Massachusetts, for Libellants, and by *Mr. Bangs*, of Massachusetts, for Claimants.

The *Crenshaw*, by *Mr. Eames*, of Washington City, for Libellants, and by *Messrs: Lord, Edwards*, and *Donohue*, of New York, for Claimants.

The *Hiawatha*, by *Mr. Evarts* and *Mr. Sedgwick*, of New York, for Libellants, and by *Mr. Edwards*, of New York, for Claimants.

The *Brilliante*, by *Mr. Eames*, of Washington City, for Libellants, and by *Mr. Carlisle*, of Washington City, for Claimants.

One argument on each side is all that can be given. Those of Mr. Dana and Mr. Carlisle have been selected, not for any reason which implies that the Reporter has presumed to pronounce judgment upon their merits as compared with those of the other distinguished counsel, but because they came to his hands in a form which relieved him of the labor which the others would have cost to re-write and condense them.

Mr. Carlisle. The Brilliante is a regularly registered Mexican ship. Her principal owner, although a Mexican citizen by birth, had been naturalized in the United States. He was, before and at the time of the seizure, the United States Consul at the port of Campeche, a port on the coast of Mexico. The vessel was seized by the United States ship Massachusetts, in Biloxi Bay, north of Ship Island, between *Pas Crétien* and Pascagoula Bay, on the 23d of June, 1861.

She had sailed from New Orleans, with a cargo of six hundred barrels of flour, put on board there about the 16th of that month, four hundred barrels for the house of the claimant, (American Consul at Campeche,) and the residue for the Mexican house of Ybana & Donde, at Sisal, also a port on the coast of Mexico; to which houses it was respectively consigned, they being owners of the same, in these proportions.

I. There was no actual breach. The question is of intent.

At the time of the seizure, the Brilliante was lying at anchor in Biloxi Bay, and had so lain at anchor twenty-four hours or more. "She came out from New Orleans and anchored in

Biloxi Bay, so as to be able to communicate with one of the blockading vessels, but did not see any vessel of war. On the next day, on which the vessel was seized, the sea was too rough to go on board the Massachusetts, which was lying in sight."

Mr. Preciat, the claimant, "wished to go on board one of the blockading vessels, to see if he could get a permit to go out to sea; otherwise he intended to have returned with the vessel to New Orleans." (Deposition of the said Preciat, taken *in preparatorio*, Record, p. 11.) He was returning to Campeche, "to attend to the duties of his office (*U. S. Consul*,) and business generally." On going to New Orleans, he had a letter from the Commander of the Brooklyn, one of the blockading squadron, to the Commander of the Niagara, another of them. forwarding him to Mobile, where his son was at school, and whom he desired to take home. The passengers and crew mutinied, and refused to go to Mobile. The mate, taking control, steered for New Orleans, where the vessel arrived, and the crew were discharged. These facts appear from the declarations *in preparatorio*. The libel and decree are exclusively founded on the alleged attempt to leave New Orleans. The claimant had a right to expect that his application to return, although sailing from New Orleans would have been granted; or, if not granted, that he would have been allowed the option of going back to New Orleans; which he declares, on his examination, was his intention, if not permitted to return to Campeche. He swears that he had no intention to violate the blockade. There is nothing to contradict him, but everything corroborates his declaration. He was at anchor twenty-four hours, and a considerable portion of that time in sight of one of the blockading vessels, which the evidence shows he could not safely attempt to reach in consequence of the state of the weather. Before that period there is nothing to show that he might not have run the blockade safely; nor is there any reason suggested or supposable why he cast anchor, except that he had no intent to violate the blockade. His public character as United States Consul, and the facts before referred to, go in confirmation of this.

But chiefly, the terms of the President's proclamation insti

tuting this so-called blockade, are important to be considered upon this question of intent. The condition of things was unprecedented. From the nature and structure of our peculiar system of government, it *could have had* no precedent. The co-existence of Federal and State sovereignties, and the double allegiance of the people of the States, which no statesman or lawyer has doubted till now, and which this Court has repeatedly recognized as lying at the foundation of some of its most important decisions; the delegation of special and limited powers to the Federal Government, with the express reservation of all other powers "to the States and the people thereof" who created the Union and established the Constitution; the powers proposed to be granted and which were refused, and the general course of the debates on the constitution; all concurred in presenting this to the President as a case of the first impression. Assuming the power to close the ports of the seceded States, he evidently did so with doubt and hesitation. If the power be conceded to him, it cannot be denied that he might modify the strict law of blockade, and impose a qualified interruption of commerce. He might well have doubted whether, under the Constitution which he had sworn to support, a state of *war* could exist between a State, or States, and the Federal Union; whether, when it ceased to be insurrection, and became the formal and deliberate act of State sovereignty, his executive powers extended to such an exigency. Certainly, the words of the Acts of Congress authorizing him to use the navy did not embrace such a case. It was not quite certain that it had assumed this imposing shape. The President, so late as his message of July, was confident that it had not. He believed that the State sovereignties had been usurped by discontented leaders and a factious and inconsiderable minority. With the information laid before him, he declared that these seceded States were full of people devoted to the Union. Well, therefore, might he hesitate to exercise, even if he supposed himself to possess, the power of declaring or "recognizing" a state of *war*. His powers in cases of insurrection or invasion were clear and undoubted. He had the army, the navy, and the militia of

the States (the United States having no militia except in the federal territories) confided to his command, *sub modo.*

But insurrection is not war; and invasion is not war. The Constitution expressly distinguishes them, and treats them as wholly different subjects. But this belongs to a subsequent question in the argument. It is now referred to as bearing upon the construction of the proclamation, and consequently upon the question of *intent* to break *a blockade.* It is true that the proclamation calls it a blockade. But the message speaks of it as proceedings "*in the nature of a blockade.*" And the proclamation itself, by its terms and provisions, substantially conforms to the latter description. It founds itself upon the existence of "*an insurrection.*" It pronounces the disturbance to be by "*a combination of persons.*" It proceeds upon the Acts of Congress provided for "*insurrections*" by "*combinations of persons.*" It declares that the executive measures are provisional and temporary only, "*until Congress shall have assembled and deliberated upon the said unlawful proceedings.*" It requires the seceded States to disperse, and return peaceably "to their respective place of abode in twenty days."

"These "combinations of persons," and these "unlawful proceedings," are not at all recognized as presenting a case for belligerent rights and obligations. Naturally and prudently, the President did not assume to proclaim a strict blockade, with the extreme rights which obtain between belligerents, and with the corresponding rights of neutrals. He first called out the *militia of the States,* as such. He then used the army and the navy, under the Act of 1807. But he knew that this was not war. It was the suppression of insurrection. Consequently, in this use of the navy, he did not contemplate capture *jure belli.* Long after the period involved in this case, he maintained to all the civilized world, (see Mr. Seward's diplomatic correspondence, 1861,) that to attribute anything of belligerent right to these "*combinations of persons*" and these "*unlawful proceedings,*" was an outrage and an offence to the United States. In effect, his position was that it was purely a *municipal* question; and,

of course there could be no blockade, in the international sense, and no capture *jure belli.*

Accordingly, the proclamation threatens not the regular proceedings of a prize Court, but "*such proceedings as may be deemed advisable.*" And these proceedings are to follow upon a seizure to be made in the precise and only case where a vessel shall have attempted to enter or leave a port, and shall have been "duly warned by the commander of one of the blockading vessels, who will endorse on her register the fact and date of such warning; *and if the same vessel shall again* attempt to enter or to leave," &c., then these undescribed proceeding shall take place.

Under these circumstances, upon the question of intent, it is submitted that the case is with the claimant.

But II. The terms of the proclamation, assuming it to have intended a *blockade,* (*jure belli,*) excuse this vessel and cargo. The only authority necessary to be referred to here is the case of *Md. Ins. Co.* vs. *Woods,* (6 Cr., 49,) decided by this Court. It is to be argued from, *a fortiori.* The qualified blockade, by a belligerent, was recognized. Notoriety of blockade in fact, and perhaps actual knowledge, are admitted in that case. But because a special warning off was provided for in this notice of the blockade, restoration was decreed. This Court said there, that they could not perceive the reasons for this modification. Nevertheless, they held it imperative. Here, the reasons are apparent.

III. This seizure took place before Congress had convened to act in the premises. It was made during that period when the President, casting about among doubtful expedients, had used the navy, under the Acts of Congress for suppressing insurrection and repelling invasion, and had used this force "*in the nature* of a blockade." It is denied that during this period there was WAR, or that the rights and obligations of war, either under the municipal or international law, had arisen. Of consequence, blockade and the prize jurisdiction could not have existed. The question here is, how can the United States, under the Constitution, be involved in war? And, to admit for a moment a

modern question, who has the power to accept, recognize, or admit a state of *war*, so that such a *status* will affect the people of the States, and foreign nations and their subjects, with the consequences of war, municipally and internationally? How are treaties suspended or abrogated? When are citizens residing in the several States placed in the condition of alien enemies, or of persons (*nolens volens*) identified with the Territory of a public enemy, in a state of public war, whether foreign or civil?

And, again, if this was not *war*, in any legal sense, who has the power of closing a port of entry of the United States against the trade of a foreign nation, to whom all ports of entry are open by treaty? This vessel and her cargo were wholly Mexican. The Port of New Orleans was a port of entry, open to her, for ingress and egress, and for all lawful commerce. How was it closed? It is clear that it was not closed by legislation. Nor was the Treaty with Mexico, which might have been suspended or abrogated by Act of Congress, (being only the "supreme law of the land," in the same sense with such acts,) in any degree disturbed by the National Legislature.

Now, this decree of condemnation could only be founded upon one of two alternatives: *seizure* under the municipal law, or *capture* under the international law, for violation, or attempt at violation, of a blockade.

It is plain that there was no municipal law by which it could be justified. The President cannot make, alter, or suspend "the supreme law of the land;" and this condemnation rests solely upon his authority.

IV. Was it capture? Blockade is a belligerent right. There must be war, before there can be blockade in the international sense, giving jurisdiction in prize. There may be an interruption of commerce, "*in the nature of a blockade.*" But this is the exercise of the legislative power, and is purely municipal. The distinction is plainly shown in *Rose* vs. *Himely*, (4 Cr., 272). But this legislative power does not reside in the President. The Constitution, in its first section, lays the corner-stone of the edifice it was erecting, declaring that "*all* legislative powers herein *granted* shall be vested in a Congress of the United States

which shall consist," &c. Therefore, it only remains to inquire, was there *war?*

But it has been objected that this question is not open here to this foreign claimant. This is a mistake. It is a principle of the law of nations that "the *sovereign* power of the State has alone the authority to make war." Wheat. on Captures, 40; Wildman, vol. 2, chap. 1. And Vattel (Lib. III, cap. 1, sec. 4) says: "The *sovereign* power has alone the authority to make war. But as the different rights which constitute this power, originally resident in the body of the nation, may be separated or limited, according to the will of the nation, *we are to seek the power of making war in the particular Constitution of each State.*" And Bacon (Ab. Tit. Prerogative) says: "It is *intex jura summi imperii*, and in England is lodged in the King; though, as my Lord Hale says, it ever succeeds best when done by parliamentary advice."

The counsel for the United States, speaking for the President, take very bold and very alarming positions upon this question. One of them testifies, in well-considered rhetoric, his amazement that a judicial tribunal should be called upon to determine whether the political power was authorized to do what it has done. He is astounded that he should be required to "ask permission of your Honors for the whole political power of the Government to exercise the ordinary right of self-defence." He pictures to himself how the world will be appalled when it finds that "*one of our Courts*" has decided that "the war is at an end." He tells us that this is merely a Prize Court, and that the Prize Court sits "by commission of the sovereign," merely as "an inquest to ascertain whether the capture has been made according to the will and intent of the sovereign." That, all the world over, the Courts merely *construe* the acts of the political power. That *war* is only "a state of things." It is the conflict of opposing forces, with guns and swords and bayonets, in large numbers; and the Executive power being actually engaged in such conflict, war exists conclusively for this "one of our Courts," sitting by "commission of the sovereign."

Another of the learned counsel tells us that "the sovereign

has assumed the responsibility. *His* Prize Court has no commission to thwart his purpose, or overrule his construction of the law of nations." And he added a significant admonition—that if "the pure and simple function of the Prize Court be transcended, then the Court is no longer a Court of the sovereign, but an ally of the enemy."

What place is this, where such thoughts are uttered? If the question were asked literally, and the dull walls of this old Senate Hall could comprehend and answer, they would give back in echoes the voices of departed patriots and statesmen—"this place is sacred to the Constitution of the United States."

But what tribunal is this? Is it "one of our Courts?" Does it sit "by commission of the sovereign?" Who is its sovereign? and what is its commission? It acknowledges the same sovereign, and none other, that is sovereign of the President and of Congress—the "respective States," and "the people" thereof It has the same commission, and none other, which gives authority to the President and to Congress—the Constitution. It arose at the creation of this Government, coeval and co-ordinate with the Executive and Legislature, independent of either or both. More, it was charged with the sublime trust and duty of sitting in judgment upon their acts, for the protection of the rights of individuals and of States, whenever "a case" should come before it, as this has come, challenging the Constitutional authority of such acts.

This is a Government created, defined, and limited by a *written* Constitution, every article, clause, and expression in which was pondered and criticised, as probably no document in the affairs of men was ever before tested, refined, and ascertained. It is the office of this Court, as an organic element of the Government, to construe this *Magna Charta*, and to bring all cases which come before it to this test. So that, as well by the peculiar quality of this Court, as by the clear doctrine of the law of nations, the question is here to be put and answered, *was there war?* Not, was there "*a state of things*" involving in point of fact all the deadly machinery, and all "the pomp and circumstance" of war; but, had "the sovereign power of the State

declared war; declared that it should exist, or that, by the act of an enemy, it *did already* exist; war with its legal incidents municipal and international?

In this first great experiment of a written Constitution, of course it was explicitly and exclusively declared, in words as plain as language affords, where this tremendous power should reside. *To Congress* is entrusted the power "to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water." Art. I., sec. 8, par. 11.

It is not pretended that at the time of this so-called capture, Congress had declared that there should be war, or that war existed, or had in any manner dealt with the question of war. The "state of things" which the counsel for the Government call "war," had arisen in vacation. But the Constitution had expressly provided for this case, and plainly distinguished it from "war." This necessity for national defence or offence, by military force, might arise by "*insurrection or invasion.*" The former is domestic, the latter foreign violence. But even in this latter case, namely, an invasion by a foreign nation, in itself an act of war by that nation, the Constitution did not depart from its inexorable rule that the country could only be involved in the legal consequences of war by Act of Congress. It contemplated temporary measures by the Executive. It authorized Congress "*to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and* REPEL INVASIONS." Art. I., sec. 8, par. 15. So that, side by side, the two cases are distinctly provided for; the power to suppress insurrections and repel invasions, which Congress might delegate to the President by a general law (as it did); and the power to put the country in the state of war, which was limited to Congress alone, acting upon the particular case.

But it has been maintained that the Acts of Congress passed subsequently to these seizures, have by retroaction recognized and validated a previous state of war. This is utterly inconsistent with the idea of a Government created by written Constitution. To affirm that when a careful and scrupulous distribution of powers has been made between the three great depart

ments of free Government, either one may exercise the powers of the other, and that a subsequent cession or approval by the competent power will validate the act, is to convert the Constitution into a mere shadow. The maxim between private principal and agent, "*omnis ratihibitio*," &c., cannot apply. The supposed "*ratihibitio*" is not by the principal who speaks in the Constitution, but by another agent of the principal having no right to delegate the special power. The matter then comes back necessarily to the pure question of the power of the President under the Constitution. And this is, perhaps, the most extraordinary part of the argument for the United States. It is founded upon a figure of speech, which is repugnant to the genius of republican institutions, and, above all, to our written Constitution. It makes the President, in some sort, the impersonation of the country, and invokes for him the power and right to use all the force he can command, to "*save the life of the nation.*" The principle of self-defense is asserted; and all power is claimed for the President. This is to assert that the Constitution contemplated and tacitly provided that the President should be dictator, and all Constitutional Government be at an end, whenever he should think that "the life of the nation" is in danger. To suppose that this Court would desire argument against such a notion, would be offensive.

It comes to the plea of necessity. The Constitution knows no such word. When it pronounced its purpose "to form a perfect Union, establish justice, secure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity," it declared that to these ends the people did "*ordain and establish this Constitution.*" In this form, and by these means, and by this distribution of powers, and not otherwise, did they provide for these ends; and they excluded all others. Any other means and powers are not Constitutional, but revolutionary.

The whole matter comes, then, to a few propositions. To justify this condemnation, there must have been *war* at the time of this so-called capture; not war as the old essayists describe it, beginning with the war between Cain and Abel; not a fight

between two, or between thousands; not a conflict carried on with these or those weapons, or by these or those numbers of men; but war as known to international law—war carrying with it the mutual recognition of the opponents as *belligerents;* giving rise to the right of blockade of *the enemy's* ports, and affecting all other nations with the character of neutrals, until they shall have mixed themselves in the contest. War, in this, the only sense important to this question, is matter of law, and not merely matter of fact.

But the Constitution, providing specially not only for armed opposition to the law, and for insurrection, (embracing its largest proportions,) but also for *invasion by a foreign enemy,* treats as totally distinct the question of *war.* It contemplates all these contingencies. For the execution of the law, for insurrection, and for *invasion,* (an act of war,) Congress provided by the Acts of 1792, 1795, and 1807.

For the case of *war,* that is, to put the country in a state of war, with the municipal and international incidents of war, Congress did not provide; because the Constitution confided that case to Congress, as exclusively and without power of delegation, as it granted the judicial power to this Court and such inferior tribunals as Congress might create. Congress had not declared war to begin, or to exist already, at the date in question. Therefore, war did not exist; blockade did not exist; and there could be no capture for breach of blockade, or intent to break it.

The power of the Executive in respect of insurrection and invasion is derived from the Constitution, and cannot transcend the limits and provisions imposed by that instrument. The President is Commander-in-Chief of the Army and Navy. He may use these forces in case of opposition to the laws, insurrection, or invasion, as Congress has provided. But when he has thus used the whole force of the nation, he has only used a power which Congress is authorized to confer upon him in the special cases enumerated in the Constitution. *War* is reserved to the judgment of Congress itself, upon the actual case arisen.

The idea of retroaction, validating the usurpation of authority

is incompatible with the theory of this Government, founded upon a written Constitution distributing with exactness the powers which it confers.

Mr. Dana. The case of the Amy Warwick presents a single question, which may be stated thus: At the time of the capture, was it competent for the President to treat as prize of war property found on the high seas, for the sole reason that it belonged to persons residing and doing business in Richmond, Virginia?

There are certain propositions applicable to war with acknowledged foreign nations, which must first be established. An examination of the reasons on which those propositions rest will aid in determining whether the propositions are also applicable to internal wars. The general rule may be stated thus:

Property found on the high seas, subject to the ownership and control of persons who themselves reside in the territory of the enemy, and thus subject to the jurisdiction and control of the enemy, is liable to capture as prize of war. (Wheaton's Int. Law, 429, 400); (1 Kent's Comm. 56–60, 74–77); (3 Phillimore's Int. Law, § 85, 483, 484); Halleck's Int. Law, 470–2, 701); *The Amy Warwick,* (24 Law Rep., 335); *The Amy Warwick,* (24 Law Rep., 494); *Venus,* (8 Cr. 280); *Sally,* (8 Cr. 384); *Frances,* (8 Cr. 363); *Bella Guidita,* (1 Rob. 207); *Gerasimo,* (11 Moore Pr. C. 86; *Aina,* (38 Eng. Law & Eq. R. 600); *Abo,* (29 Eng. Law & Eq. R. 594); *Industrie,* (33 Eng. Law & Eq. R. 572); *Ida,* (Spinke's R. 33); *Baltic,* (11 Moore's Pr. C. 111); *Brown* vs. *United States,* 8 Cranch, 110), *The Hallis Jackson,* (Betts, J.); *The N. Carolina,* (Betts, J.); *Pioneer,* (Betts, J.); *Crenshaw,* (Betts, J.); *Gen. Green,* (Betts, J.); *Chester,* (2 Dall. 41); *Thirty hdds. sugar,* (9 Cr. 191); *Betsey,* (2 Cr. 64); *Mailey* vs. *Shattuck* (3 Cr. 488); *Livingstone* vs. *M. I. Co.,* (7 Cr. 506); *Escott,* (1 Rob. 203, n.); *Lady Jane,* (Rob., 202); *Hoop,* (1 Rob., 198); *Indian Chief,* (3 Rob., 12); *Danous,* (4 Rob., 255 n.); *Anna Catherina,* (4 Rob., 107); *President,* (5 Rob., 277); *The Meaco,* (Grier, J.); *The Marathon,* (Grier, J.); *The Amelia,* (Grier, J.); *Edw Barnard,* (Betts, J.); *S. Independence,* (Sprague J.); *Victoria*

(Sprague, J.); *Charlotte,* (Sprague, J.); *Gen. Parkhill,* (Cadwalader, J.)

The above cases will be found to sustain the following propositions which I suppose will not be controverted, as applicable to cases of war with a recognized foreign power, and therefore are not elaborated.

First, It is immaterial in such case, whether the owner of the property has or has not taken part in the war, or given aid or comfort to the enemy, under whose power he resides.

Second. It is immaterial whether he be or be not, by birth or naturalization, a citizen or subject of the enemy; and if he be, whether he be loyal to his sovereign, or in sympathy with and actually aiding the capturing power.

Third. He may be a subject of a neutral sovereign. He may even be a special and privileged resident, as consul of a neutral power. Still, if property subject to his ownership and control, while he so resides, is found at sea, engaged in commerce, though it be lawful commerce with neutrals, it comes under the rule. Its capture is one of the justifiable modes of coercing the enemy with whom he resides.

Fourth. The owner may even be a citizen of the country making the capture; and there may be no evidence that he is disloyal to his own country, or that his residence with the enemy is not accidental or forcible. These are immaterial inquiries. The loss to him is immaterial, in the judicial point of view. The recognized right to coerce the enemy power affects the property, as it was situated when captured. The Court can look no farther. It is a political question whether the exercise of the right shall be insisted on.

Fifth. It is not necessary to show that the property in the particular case, if not captured, or if restored, would in fact have benefitted the enemy, and that its capture would tend to the injury of the enemy. The laws of war go by general rules. Property *in a certain predicament* is condemned, the general rule being founded on the experience and concession that property so situated is or may be useful to the enemy in the war, and that

the rights of neutrals and the dictates of humanity do not forbid its capture.

Sixth. It is not necessary that the property shall be at the time on a voyage to or from the enemy's country. The reason for the rule ordinarily seems stronger where the voyage is directly to the enemy's country, so that but for the capture it would have been actually subject to his control. But the rule is the same, wherever the vessel is bound. We have a right to prevent commerce and its gains on the part of persons residing in the territory of the enemy. And if the owner is friendly to the power under which he lives, the proceeds, subject to order in a foreign port, may be especially useful to that power.

I will now proceed to an examination of the reasons on which the preceding propositions rest, and afterwards consider whether those reasons are not equally applicable to an internal war.

WAR is simply the exercise of force by bodies politic, or bodies assuming to be bodies politic, against each other, for the purpose of coercion. The means and modes of doing this are called belligerent powers. The customs and opinions of modern civilization have recognized certain modes of coercing the power you are acting against as justifiable. Injury to private persons or their property is avoided as far as it reasonably can be. Wherever private property is taken or destroyed, it is because it is of such a character, or so situated, as to make its capture a justifiable means of coercing the power with which you are at war. For war is not upon the theory of punishing individuals for offences, on the contrary (except for violations of rules of war), it ignores jurisdiction, penalties and crimes, and is only a system of coercion of the power you are acting against.

If, then, the hostile power has title or direct interest in the property, as if it is public property, it is, of course, liable to capture.

If the property is of a character ordinarily used in war, and in the possession of that power, or on its way to his possession, it is liable to capture. In such case it is immaterial in whom is the title.

The hostile power has an interest in the private property of

all persons living within its limits or control; for such property is a subject of taxation, contribution, confiscation and use, with or without compensation. But the humanity of modern times has abstained from the taking of private property not liable to use in war, when on land. Some of the reasons for this, are, the infinite varieties of its character, the difficulty of discriminating among these varieties, the need of much of it to support the life of non-combatant persons and animals, and, above all, the moral dangers attending searches and captures in households. But on the high seas, these reasons do not apply. Strictly personal effects are not taken. Merchandise sent to sea, is sent voluntarily, embarked by merchants on an enterprise of profit taking the risks, is in the custody of men trained and paid for the business, and its value is usually capable of compensation in money. The sea is *res omnium*. It is the common field of war, as well as of commerce. The object of maritime commerce is the enriching of the owner by the transit over the common field; and it is the most usual object of revenue to the power under whose government the owner resides.

For these and other reasons, the rule of coercion by capture is applied to private property at sea. *If the power with which you are at war has such an interest in its transit, arrival or existence, as to make its capture one of the fair modes of coercion, you may take it. The reason why you may capture it is that it is a justifiable mode of coercing the power with which you are at war. The fact which makes it a justifiable mode of coercing that power, is that the owner is residing under his jurisdiction and control.*

It is therefore evident, from this course of reasoning, that the capture in case *of enemy property does not rest at all on any actual or constructive criminality or hostility of the owner.* Suppose him to be a neutral, he has a right to reside with your enemy, and trade to and from thence, as against all your laws and the laws of war. If he is a loyal subject of your own, and is accidentally or forcibly detained in your enemy's country, and even is struggling to get away, his property is liable to capture, on this general principle. It is for the political power alone to say whether it will forego the condemnation The Courts must

adjudicate it to be a lawful prize. If he be a born and willing subject of your enemy, your right to capture is none the greater nor is the legal reason for the capture different, though the reason may be more gratifying to the moral sense, and the capture more satisfactory. If the trader residing there is suspected of disaffection to that power, and of affection for you, his property is all the more likely to be subjected to contributions, if not actual confiscation by your enemy. He is not his own master, still less the master of his property. He and it are under your enemy's jurisdiction and control. You may capture it and refuse to restore it to the claimant, while he so resides and the war lasts, even if you compensate or remunerate him afterwards But that is a political question. The Courts can only condemn it, if the political power asks for its condemnation.

Such being the rules applicable to external wars, and such the reasons on which the rules rest, we come to the question whether they are not equally applicable to internal wars?

But, first, the following general rule is established on authority.

In internal wars, it is competent for the sovereign to exercise belligerent powers generally. *Rose* vs. *Himely*, (4 Cranch, 272); *Cherriot* vs. *Foussett*, (3 Binney, 253); *Dobrie* vs. *Napier*, (3 Scott, 225); *Santissima Trinidad*, (7 Wheat., 306); *United States* vs. *Palmer*, (3 Wheat., 635); (Wheaton's International Law, p. 363, 5); (Grotius de Jure Belli, Prol. sec. 25); Burlamaqui, (N. & P. L., 263); 2 Rutherf. Inst., 503); (Hay & Marriot. 47, 23, 197, 216, 78, 94, 83): *Bynk, L. of W.*, (3 Hall's L. J., p. 11); *The Admiral*, (Grier, J., Law Int., Sep. 19, 1862); *The Marathon*, (Grier, J.); *The Meaco*, (Grier, J.); *The Amelia*, (Grier, J.); *Amy Warwick*, (24 Law Rep., 335, 494); *Gen. Parkhill*, (Cadwalader, J.); *Tropic Wind*, (Dunlop, J.); *Hiawatha, Hallis Jackson, Crenshaw, N. Carolina, etc.*, (Betts, J.)

None of the above cited cases make any distinction among belligerent powers, but treat them all as equally open to the sovereign in case of internal war.

The reasons on which the rules respecting belligerent powers rest, are applicable to internal wars as well as to external wars

(1.) The object of the sovereign is to coerce the power which is organized against him, and making war upon him.

(2.) This power exercises jurisdiction and control *de facto*, and claims it *de jure* over the territory. It compels obedience, and exacts allegiance from all inhabitants of the territory, without respect to their wishes. It compels each inhabitant to pay taxes and imposts upon his property, to aid in the war, and makes his property liable to contribution or confiscation. This power therefore has the same interest in the merchandise of an inhabitant of the territory at sea, for the purposes of the war, as if it were an acknowledged sovereign. And the parent state has the same interest in the capture of the property, for the purpose of coercing the rebel power.

(3.) The right of the sovereign to capture it *jure belli*, is *not derived from any actual or presumed disloyalty or criminality of the owner*. It is equally immaterial, as in a foreign war, whether the owner is a citizen, alien or friend. Whether in other respects he has taken part in the war, or on which side. Whether the rebel power considers him faithful to them, or suspects him, or has him in prison as a traitor. The test and the reason is *the predicament of the property*.

(4.) If the owner was hostile to the *de facto* government under which he lives, and they had actually declared the property in question to be confiscated, before its capture, it would not be doubted that it was subject to capture. But their laws and rules respecting allegiance, obedience, contribution, confiscation and taxation, govern and affect this property, *in fact* (although, the sovereign will not admit *de jure*), so long as it is out of the actual custody and control of the parent sovereign.

(5.) It does not follow from his residence that the owner of the property in civil wars, owes general allegiance to the sovereign. He may be an alien, or even a mercenary soldier, or a political agent of some power that has recognized the rebels as a nation.

(6.) Suppose a part of a sovereign's dominions are wrested from him in public war, and his enemy establishes a civil as well as military government over it, and claims it as his own,

and the local authorities and a majority of the inhabitants acquiesce in the new dynasty, and it is established *de facto*; can it be doubted that it is *competent* for the sovereign to capture property of its inhabitants, at sea, as a means of coercion of the power possessing it?

It is still a political question with the sovereign, whether he will capture such property, and if condemned, whether, after a peace, he will compensate the owner, on proof of merit.

I will now consider certain objections made to the application to internal wars of the doctrine of *enemy's property.*

(1.) It is objected that the exercise of this power is inconsisten with the claim to civil jurisdiction over the owner.

Not more so than in foreign war. There the property of a subject is liable to capture, if it is in a certain predicament, *e. g.* if it is the peculiar product of enemy territory, and exported thence, or if the owner resides (however unwillingly) in the enemy's territory and under his jurisdiction.

(2.) It is objected that so the property of a loyal citizen may be condemned.

Not more so, than in foreign war. The property in the given predicament may belong to a loyal friend and subject, or an indifferent neutral. It is a political question whether the right shall be exerted over all such property, on reasons of general policy, or whether exceptions shall be made in case the owner so resident is loyal to us, or sympathizes with us.

(It is worthy of remark that the sovereign can exercise these belligerent powers at first, if ever. The lapse of time gives him no new rights of war. The recognition of the rebel state as belligerent by foreign powers, confers no right on the sovereign. It only recognizes an existing right. The recognition of rebel States as sovereign by foreign powers, confers on the sovereign no new war power. The moment he ceases to claim jurisdiction over the rebel territory, the war ceases to be a civil war, and becomes an international war.

The objections really amount to this, that *war powers can never be exercised in civil wars, at any stage, except by the rebels.*

According to this theory, if the civil war is one in which each

party claims to be the state, neither can exercise belligerent powers. If neither makes that claim, both may exercise them. If one claims to be the state, and the other does not, (as in this case,) the latter only can exercise them.)

(3.) It is contended that if the owner is a traitor, his property is exempt from confiscation by the Constitution. Art. 3, sec. 3 and the Act 1790, ch. 9, sec. 24.

But there is no allegation or evidence that the claimants of this property are traitors. The Government has never treated or proceeded against them as such. And if they be traitors, they cannot compel the Government to proceed against them by indictment as traitors, and bring them within the clause of the Constitution. It cannot be admitted that the clause of the Constitution would exempt their personal property from confiscation, by proof on their part, of the commission of treason by them, if they were not proceeded against as traitors.

(4.) If it is objected that a traitor cannot personally be treated as a belligerent, or as levying war, I answer that the Constitution not only contemplates that treason may take the form of war, but confines treason, under our laws, to acts of such character and magnitude as amount to "*levying war* against the United States," or aiding those who are so levying war. Constitution, art. 3, sec. 3.

Having then established the position that in internal wars the sovereign may exercise belligerent powers, and that captures on the high seas on the ground of enemy's property form no exception to the rule, and are equally open to him with other powers, we come to consider what must be the condition of territory on which the owner resides to make his property enemy's property within the meaning of the law of prizes.

First. What is the rule in the case of external wars?

It is not necessary that the residence should be within the regular dominions of the enemy, as they were when the war began, or as they shall have since been established by treaty or public law.

It is sufficient if the territory is in the permanent occupation

of the enemy, who has established himself there, not avowedly for temporary purposes, but to hold so long as war shall enable him to hold it. If the enemy has established a civil and military government over it, and claims and exacts allegiance from all inhabitants, levies taxes, &c., the case admits of no doubt. *Gerasimo*, (11 Moore Pr. C. 101, cases there cited); *U. States* vs. *Rice*, (4 Wheat. 246); *The Meaco*, (Grier, J.); *Amy Warwick*, (Sprague, J., 24 Law Rep., 335); *Thirty hhds. sugar*, (9 Cr. 191.)

The principles will be found fully discussed in the case of the *Gerasimo*, supra.

The reason of the rule is this: The property must either be condemned or restored to the claimant. If restored, it goes under his legal control. He is a resident of the enemy's country, and this property, so restored, would go into the control of the enemy and add to his resources. The object of maritime capture is to straiten and reduce the enemy's means and resources. *Ex. gr.* if this ship had been permitted to go to Richmond, she and her cargo would have paid duties to the rebel government. They could have taken the vessel for military purposes. They could have taken the cargo for military necessities, with or without compensation as they should see fit. If they regarded the owner as an enemy, they could take it as a prize of war, or by way of confiscation.

(The law of prize of war, which condemns property that even by misfortune of a friendly owner, is impressed with a hostile character, or is going, when captured, into enemy's control, or will so go if restored, must not be confounded with municipal forfeiture or confiscation, which is usually penal or punitive for some offence of the owner.)

These reasons show that they are equally applicable to internal wars. The test is whether *the residence of the owner is under the established de facto jurisdiction and control of the enemy.*

In the *Castine* case, (*U. S.* vs. *Rice*, supra) there can be no doubt that it was *competent* for our Government to capture a vessel bound into that port in that state of things, and belonging to a person residing there, without reference to whether he was

as to his general political allegiance, a citizen of the United States, or a neutral alien, or a British subject.

It is not necessary to draw a fine line as to what is to be deemed enemy's territory, for the purpose of deciding this case, —if the above principles are applicable to internal war. I suppose it will be conceded that the nature and character of the occupation of Richmond, Va., was more than sufficient to constitute it enemy's territory, within the meaning of the rule.

We are now brought to another branch of the question before the Court. Conceding that the Sovereign may exercise belligerent powers in internal wars, and that capture on the ground of enemy's property is among those powers, and that Richmond was enemy's territory—it is still contended that under our Constitution, the exercise of these powers was not made by the proper authorities, and in the proper state of things.

It is contended that the President cannot exercise war powers until Congress shall first have "declared war," or, at least, done some act recognizing that a case exists for the exercise of war powers, and of what war powers.

There is nothing in the distribution of powers under our Constitution which makes the exercise of this war power illegal, by reason of the authority under which this capture was made.

I. It is not necessary to the exercise of war powers by the President, in a case of foreign war, that there should be a preceding act of Congress declaring war.

The Constitution gives to Congress the power to "declare war."

But there are two parties to a war. War is *a state of things*, and not an act of legislative will. If a foreign power springs a war upon us by sea and land, during a recess of Congress, exercising all belligerent rights of capture, the question is, whether the President can repel war with war, and make prisoners and prizes by the army, navy and militia which he has called into service and employed to repel the invasion, in pursuance of general acts of Congress, before Congress can meet? or whether that would be illegal?

In the case of the Mexican war, there was only a subsequent

gcreonition of a state of war by Congress; yet all the prior acts of the President were lawful acts of war.

It is enough to state the proposition. If it be not so, there is no protection to the State.

The question is not what would be the result of a conflict between the Executive and Legislature, during an actual invasion by a foreign enemy, the Legislature refusing to declare war. But it is as to the power of the President before Congress shall have acted, in case of a war actually existing. It is not as to the right *to initiate a war, as a voluntary act of sovereignty.* That is vested only in Congress.

II. In case of civil war, the President may, in the absence of any Act of Congress on the subject, meet the war by the exercise of belligerent maritime capture.

The same overwhelming reasons of necessity govern this position, as the preceding.

This position has been recognized by every Court into which the prize causes have been brought in this country, by Judge Dunlop, the District of Columbia; Judge Giles, in Maryland; Judge Marvin, in Florida; Judge Betts, in New York; Judge Sprague, in Massachusetts; Judge Cadwalader, in Pennsylvania.

There are general Acts of Congress clothing the President with power to use the army and navy to suppress insurrections. Act 1795, ch. 36, sec. 2; Act 1807, ch. 39.

And it must be admitted that the function of using the army and navy for that purpose is an Executive function. But it is contended that before they are used as belligerent powers, before captures can be made, on grounds of blockade and enemy property, Congress must pass upon the case, and determine whether the powers shall be exerted.

Now, if Congress must so adjudge in the first instance, why not throughout the war? Civil wars change their character, from day to day and place to place. Congress should be a council of war in perpetual session, to determine when, how long, and how far this or that belligerent right shall be exerted.

The function to use the army and navy being in the President, the mode of using them, within the rules of civilized war

fare, and subject to established laws of Congress, must be subject to his discretion as a necessary incident to the use, in the absence of any Act of Congress controlling him.

III. There were no Acts of Congress at the time of this capture (July 10, 1861,) in any way controlling this discretion of the President.

IV. Since the capture, Congress has recognized the validity of these acts of the President.

The Act Aug. 6, 1861, ch. 63, sec. 3, legalizes, among other things, the proclamations, acts and orders of the President respecting the navy. This includes the blockades, and the orders respecting captures.

The Act March 25, 1862, ch. 50, regulating prize proceedings, in sec. 5, recognizes prize causes as "now pending" in the Courts.

The proclamations make the blockades belligerent acts, and not municipal surveillance. They are declared to be "in pursuance of the law of nations," and guaranteed to be made effective and actual, and provision is made for warning.

They had been always treated as blockades under the laws of war, by the Executive, by the Courts and by neutral powers, before the passage of this Act.

Act July 17, 1862, ch. 204, sec. 12, recognizes prize causes as *now pending*, and regulates them; and recognizes decrees of condemnation in pending cases.

The Resolution of July 17, 1862 (No. 65), regulates the custody of prize money now in the Registry of the Courts.

When these acts were passed, Congress knew that great numbers of captures had been made, solely on the ground of "enemy property;" that the President had, through the several U. S. Attorneys, asked for their condemnation; that they had been condemned, solely on that ground, in all the chief districts; that condemnation on that ground had been refused in none; and that the proceeds of prizes condemned as enemy property were in the Treasury awaiting distribution.

All the acts for the increase of the army and navy, and for raising volunteers, speak of this state of things as a "war."

It is contended that the Act of July, 1861, ch. 3, secs. 5 and 6, is an action by Congress on the subject, inconsistent with condemnation of this property.

To this, I reply:

I. The capture, in this case, was before the passage of the act. The statute does not retroact.

It is an established rule to interpret statutory law as taking effect from its passage, not as varying the law or its administration by retroactive operations. *Matthews* vs. *Zane*, (7 Wheat., 211); 1 Kent's Com., 455, notes.

The statute does not in its terms contemplate a retroactive effect, but rather the reverse. Congress at the time of passing it knew that the President had exercised, as of right, full belligerent power to capture at sea on all the recognized grounds of war,—contraband, breach of blockade, and enemy property; and that the Courts were entertaining prize jurisdiction on those grounds.

Under such circumstances, if Congress intended to make void all those acts, it should be expressed in terms, unless it were necessarily and unavoidably the result of the statute, construed with all the established presumptions against retroaction.

All the Courts of the United States which have acted on prize causes since the passage of the act, have construed it as not retroactive.

II. There is no inconsistency in Congress, declining to act on the exercise of war powers by the President in the past, and at the same time making new and special provisions, qualifying or altering the mode of exercising those powers after a future event.

III. To give it a retroactive effect, would render this statute inconsistent with the Act of August 6th, 1861, ch. 63, sec. 3.

IV. The Act of 13th of August, 1861, does not relate to belligerent captures and prizes. It provides for civil forfeitures and confiscations, in the exercise of civil jurisdiction.

(1.) The terms "captures" and "prize" are not used. The terms are "seizure," "forfeiture," and "confiscation." The former are terms of war, the latter, of civil proceedings. Park on Ins.

c. 4, p. 73, 2 Arnould on Ins. § 303, *Richardson* vs. *M. F & M. I. Co.*, (6 Mass., 108), Constitution of United States, Art. 1, sec. 8, *Higginson* vs. *Pomeroy*, (11 Mass., 110), *Black* vs. *Marine I. Co.*, (11 Johns., 292), *Thompson* vs. *Reed*, (12 S. & R., 443), Halleck's Int. Law ch. 12, § 14, Halleck's Int. Gov., c. 30; *Rhinelander* vs. *I. Co. of Pa.*, (4 Cr., 42, 44), *Carrington* vs. *Merch. I. Co.*, (8 Pet., 518, 519); *Bradstreet* vs. *Neptune I. Co.*, (3 Sumner, 605, 616), *Davison* vs. *Seal Skins*, (2 Paine, 324).

(2.) The Secretary of the Treasury has full powers of remission of the "forfeitures," as in revenue cases, under Act of 1797 ch. 13, vol. 1, p. 506. This he may do, by general regulations of the Treasury Department. This is unknown to prize or belligerent proceedings, and inapplicable to them.

(3.) Sec. 9 gives jurisdiction over the "forfeitures," to certain Courts, which would be unnecessary if these were cases of prize.

(4.) The prize laws give an interest to the captors. Under this statute, the title rests in the United States by "forfeiture."

(5.) Sec. 6 introduces a principle unknown to prize law, to wit That the whole vessel is condemned, on the sole ground that the owner of a part resided in enemy's territory. Congress can hardly have intended that.

That such is the true construction of the section, appears from the debates at the time of its passage.

This construction has been put upon it by the Courts, and the Treasury has adopted it, and authorized a remission of the forfeiture of the shares owned by residents in loyal States, under certain circumstances.

The true construction of the act, I respectfully submit to be this

It is not an act specially providing for the present rebellion or, in terms, alluding to it. It is a general act, applicable to all times, and to rebellions or civil wars, of every possible character. The President might or might not, at his option, apply it to the present rebellion by issuing or not his proclamation. The act is applicable, at the option of any President, to a rebellion which is carried on under State authority, and it is applicable to no other.

Property may often be so situated as to become the subject both of condemnation as prize of war, and forfeiture by civil law. In that case, the prize law has the precedence. The cases of the *Rapid, St. Lawrence, Alexander,* and *Joseph,* in (1 Galli son's Rep.)

In further proof that this statute was not intended to estab lish or regulate or modify or affect the law of prize, it is observable that it touches small portions of entire matters over which the President had been exercising the right of belligerent capture, and has exercised them still without objection by Congress.

Sec. 6 does not forfeit vessels of persons residing in the rebel States, if found in the ports of those States. A rebel man-of-war could not be forfeited under that act if found in their own ports, nor if found elsewhere, if the title was in a neutral or a citizen of a loyal State. (Nor could it be condemned under the Act of August 6th, 1861, unless the owner of the vessel know ingly allowed it to be used in the war.)

Sec. 5 forfeits no property unless passing between the designated States and the other States. If found in the rebel States, or passing between rebel States, it is not forfeited, even if it be contraband of war. (Nor would it be forfeited if found there, under the Act of August 6th, 1861, unless the owner had knowingly allowed it to be used in the war.) If found at sea, passing between two rebel States, or between a rebel State and a neutral port, it would escape. Under this statute, no property could be seized for breach of blockade, unless passing between a rebel and a loyal State; no vessel could be seized for breach of blockade unless it was not only passing between a rebel and a loyal State. but carrying cargo; and the fact that the property was contraband would not forfeit it or the vessel carrying it, if it was bound from a neutral port.

That the rebellion had come to a state requiring the exercise by us of the war powers of blockade and capture, has been passed upon by the political department of the Government,—by both the Executive and Legislative branches. That is conclusive on the Courts. President's proclamations of April 15, April 19, 1861, and April 27, May 3, 1861; Acts of Congress,

Aug. 6, 1861, ch. 63, sec. 3; March 25, 1862, ch. 50; and July 17. 1862, ch. 234, sec. 12.

Whether a particular place, which the owner of the vessel inhabits, is enemy's territory, is for the Court to decide. The *Gerasimo*, (11 Moore, Pr. C., 101).

If the political department of the Government has decided that question, that is, of course, conclusive on the Courts.

If it has not been passed upon by the political department, the Court must decide it as a question of fact.

In this case, the political department decided that Richmond was in enemy territory, on the 10th of July, 1861. Proclamation of April 27, 1861, and Aug. 16, 1861; Act of Congress of Aug. 6, 1861, ch. 63, sec. 3.

We are brought, then, to three propositions:—

I. The right to capture, on the high seas, the property of persons residing in the enemy's territory, may be exercised in internal war.

II. In the present war, that right has been exercised by an authority which this Court must deem competent.

III. Richmond, Virginia, was enemy's territory, within the meaning of the law of prize, *jure belli*, at the time of this capture.

Mr. Justice GRIER. There are certain propositions of law which must necessarily affect the ultimate decision of these cases, and many others, which it will be proper to discuss and decide before we notice the special facts peculiar to each.

They are, 1st. Had the President a right to institute a blockade of ports in possession of persons in armed rebellion against the Government, on the principles of international law, as known and acknowledged among civilized States?

2d. Was the property of persons domiciled or residing within those States a proper subject of capture on the sea as "enemies' property?"

I. Neutrals have a right to challenge the existence of a blockade *de facto*, and also the authority of the party exercising the right to institute it. They have a right to enter the ports

of a friendly nation for the purposes of trade and commerce, but are bound to recognize the rights of a belligerent engaged in actual war, to use this mode of coercion, for the purpose of subduing the enemy.

That a blockade *de facto* actually existed, and was formally declared and notified by the President on the 27th and 30th of April, 1861, is an admitted fact in these cases.

That the President, as the Executive Chief of the Government and Commander-in-chief of the Army and Navy, was the proper person to make such notification, has not been, and cannot be disputed.

The right of prize and capture has its origin in the "*jus belli*," and is goverend and adjudged under the law of nations. To legitimate the capture of a neutral vessel or property on the high seas, a war must exist *de facto*, and the neutral must have a knowledge or notice of the intention of one of the parties belligerent to use this mode of coercion against a port, city, or territory, in possession of the other.

Let us enquire whether, at the time this blockade was instituted, a state of war existed which would justify a resort to these means of subduing the hostile force.

War has been well defined to be, "That state in which a nation prosecutes its right by force."

The parties belligerent in a public war are independent nations. But it is not necessary to constitute war, that both parties should be acknowledged as independent nations or sovereign States. A war may exist where one of the belligerents, claims sovereign rights as against the other.

Insurrection against a government may or may not culminate in an organized rebellion, but a civil war always begins by insurrection against the lawful authority of the Government. A civil war is never solemnly declared; it becomes such by its accidents—the number, power, and organization of the persons who originate and carry it on. When the party in rebellion occupy and hold in a hostile manner a certain portion of territory; have declared their independence; have cast off their allegiance; have organized armies; have commenced hostilities

against their former sovereign, the world acknowledges them as belligerents, and the contest a *war*. *They* claim to be in arms to establish their liberty and independence, in order to become a sovereign State, while the sovereign party treats them as insurgents and rebels who owe allegiance, and who should be punished with death for their treason.

The laws of war, as established among nations, have their foundation in reason, and all tend to mitigate the cruelties and misery produced by the scourge of war. Hence the parties to a civil war usually concede to each other belligerent rights. They exchange prisoners, and adopt the other courtesies and rules common to public or national wars.

"A civil war," says Vattel, "breaks the bands of society and government, or at least suspends their force and effect; it produces in the nation two independent parties, who consider each other as enemies, and acknowledge no common judge. Those two parties, therefore, must necessarily be considered as constituting, at least for a time, two separate bodies, two distinct societies. Having no common superior to judge between them, they stand in precisely the same predicament as two nations who engage in a contest and have recourse to arms.

"This being the case, it is very evident that the common laws of war—those maxims of humanity, moderation, and honor—ought to be observed by both parties in every civil war. Should the sovereign conceive he has a right to hang up his prisoners as rebels, the opposite party will make reprisals, &c., &c.; the war will become cruel, horrible, and every day more destructive to the nation."

As a civil war is never publicly proclaimed, *eo nomine* against insurgents, its actual existence is a fact in our domestic history which the Court is bound to notice and to know.

The true test of its existence, as found in the writing of the sages of the common law, may be thus summarily stated: "When the regular course of justice is interrupted by revolt, rebellion, or insurrection, so that the Courts of Justice cannot be kept open, *civil war exists* and hostilities may be prosecuted

on the same footing as if those opposing the Government were foreign enemies invading the land."

By the Constitution, Congress alone has the power to declare a national or foreign war. It cannot declare war against a State, or any number of States, by virtue of any clause in the Constitution. The Constitution confers on the President the whole Executive power. He is bound to take care that the laws be faithfully executed. He is Commander-in-chief of the Army and Navy of the United States, and of the militia of the several States when called into the actual service of the United States. He has no power to initiate or declare a war either against a foreign nation or a domestic State. But by the Acts of Congress of February 28th, 1795, and 3d of March, 1807, he is authorized to called out the militia and use the military and naval forces of the United States in case of invasion by foreign nations, and to suppress insurrection against the government of a State or of the United States.

If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. And whether the hostile party be a foreign invader, or States organized in rebellion, it is none the less a war, although the declaration of it be "*unilateral.*" Lord Stowell (1 Dodson, 247) observes, 'It is not the less a war on *that account*, for war may exist without a declaration on either side. It is so laid down by the best writers on the law of nations. A declaration of war by one country only, is not a mere challenge to be accepted or refused at pleasure by the other."

The battles of Palo Alto and Resaca de la Palma had been fought before the passage of the Act of Congress of May 13th, 1846, which recognized "*a state of war as existing by the act of the Republic of Mexico.*" This act not only provided for the future prosecution of the war, but was itself a vindication and ratification of the Act of the President in accepting the challenge without a previous formal declaration of war by Congress.

This greatest of civil wars was not gradually developed by

popular commotion, tumultuous assemblies, or local unorganized insurrections. However long may have been its previous conception, it nevertheless sprung forth suddenly from the parent brain, a Minerva in the full panoply of *war*. The President was bound to meet it in the shape it presented itself, without waiting for Congress to baptize it with a name; and no name given to it by him or them could change the fact.

It is not the less a civil war, with belligerent parties in hostile array, because it may be called an "insurrection" by one side, and the insurgents be considered as rebels or traitors. It is not necessary that the independence of the revolted province or State be acknowledged in order to constitute it a party belligerent in a war according to the law of nations. Foreign nations acknowledge it as war by a declaration of neutrality. The condition of neutrality cannot exist unless there be two belligerent parties. In the case of the *Santissima Trinidad*, (7 Wheaton, 337,) this Court say: "The Government of the United States has recognized the existence of a civil war between Spain and her colonies, and has avowed her determination to remain neutral between the parties. Each party is therefore deemed by us a belligerent nation, having, so far as concerns us, the sovereign rights of war." (See also 3 Binn., 252.)

As soon as the news of the attack on Fort Sumter, and the organization of a government by the seceding States, assuming to act as belligerents, could become known in Europe, to wit, on the 13th of May, 1861, the Queen of England issued her proclamation of neutrality, "recognizing hostilities as existing between the Government of the United States of America and *certain States* styling themselves the Confederate States of America." This was immediately followed by similar declarations or silent acquiescence by other nations.

After such an official recognition by the sovereign, a citizen of a foreign State is estopped to deny the existence of a war with all its consequences as regards neutrals. They cannot ask a Court to affect a technical ignorance of the existence of a war, which all the world acknowledges to be the greatest civil war known in the history of the human race, and thus cripple the

arm of the Government and paralyze its power by subtle definitions and ingenious sophisms.

The law of nations is also called the law of nature; it is founded on the common consent as well as the common sense of the world. It contains no such anomalous doctrine as that which this Court are now for the first time desired to pronounce, to wit: That insurgents who have risen in rebellion against their sovereign, expelled her Courts, established a revolutionary government, organized armies, and commenced hostilities, are not *enemies* because they are *traitors;* and a war levied on the Government by traitors, in order to dismember and destroy it, is not a *war* because it is an "insurrection."

Whether the President in fulfilling his duties, as Commander in-chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided *by him,* and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted. "He must determine what degree of force the crisis demands." The proclamation of blockade is itself official and conclusive evidence to the Court that a state of war existed which demanded and authorized a recourse to such a measure, under the circumstances peculiar to the case.

The correspondence of Lord Lyons with the Secretary of State admits the fact and concludes the question.

If it were necessary to the technical existence of a war, that it should have a legislative sanction, we find it in almost every act passed at the extraordinary session of the Legislature of 1861, which was wholly employed in enacting laws to enable the Government to prosecute the war with vigor and efficiency. And finally, in 1861, we find Congress "*ex majore cautela*" and in anticipation of such astute objections, passing an act "approving, legalizing, and making valid all the acts, proclamations, and orders of the President, &c., as if they had been *issued and done under the previous express authority* and direction of the Congress of the United States."

Without admitting that such an act was necessary under the circumstances, it is plain that if the President had in any manner assumed powers which it was necessary should have the authority or sanction of Congress, that on the well known principle of law, "*omnis ratihabitio retrotrahitur et mandato equiparatur*," this ratification has operated to perfectly cure the defect. In the case of *Brown* vs. *United States*, (8 Cr., 131, 132, 133,) Mr. Justice Story treats of this subject, and cites numerous authorities to which we may refer to prove this position, and concludes, "I am perfectly satisfied that no subject can commence hostilities or capture property of an enemy, when the sovereign has prohibited it. But suppose he did, I would ask if the sovereign may not ratify his proceedings, and thus by a retroactive operation give validity to them?"

Although Mr. Justice Story dissented from the majority of the Court on the whole case, the doctrine stated by him on this point is correct and fully substantiated by authority.

The objection made to this act of ratification, that it is *expost facto*, and therefore unconstitutional and void, might possibly have some weight on the trial of an indictment in a criminal Court. But precedents from that source cannot be received as authoritative in a tribunal administering public and international law.

On this first question therefore we are of the opinion that the President had a right, *jure belli*, to institute a blockade of ports in possession of the States in rebellion, which neutrals are bound to regard.

II. We come now to the consideration of the second question. What is included in the term "*enemies' property?*"

Is the property of all persons residing within the territory of the States now in rebellion, captured on the high seas, to be treated as "enemies' property" whether the owner be in arms against the Government or not?

The right of one belligerent not only to coerce the other by direct force, but also to cripple his resources by the seizure or destruction of his property, is a necessary result of a state of war. Money and wealth, the products of agriculture and com

.merce, are said to be the sinews of war, and as necessary in its conduct as numbers and physical force. Hence it is, that the laws of war recognize the right of a belligerent to cut these sinews of the power of the enemy, by capturing his property on the high seas.

The appellants contend that the term "enemy" is properly applicable to those only who are subjects or citizens of a foreign State at war with our own. They quote from the pages of the common law, which say, "that persons who wage war against the King may be of two kinds, subjects or citizens. The former are not proper enemies, but rebels and traitors; the latter are those that come properly under the name of enemies."

They insist, moreover, that the President himself, in his proclamation, admits that great numbers of the persons residing within the territories in possession of the insurgent government, are loyal in their feelings, and forced by compulsion and the violence of the rebellious and revolutionary party and its "*de facto* government" to submit to their laws and assist in their scheme of revolution; that the acts of the usurping government cannot legally sever the bond of their allegiance; they have, therefore, a co-relative right to claim the protection of the government for their persons and property, and to be treated as loyal citizens, till legally convicted of having renounced their allegiance and made war against the Government by treasonably resisting its laws.

They contend, also, that insurrection is the act of individuals and not of a government or sovereignty; that the individuals engaged are subjects of law. That confiscation of their property can be effected only under a municipal law. That by the law of the land such confiscation cannot take place without the conviction of the owner of some offence, and finally that the secession ordinances are nullities and ineffectual to release any citizen from his allegiance to the national Government, and consequently that the Constitution and Laws of the United States are still operative over persons in all the States for punishment as well as protection

This argument rests on the assumption of two propositions

each of which is without foundation on the established law of nations. It assumes that where a civil war exists, the party belligerent claiming to be sovereign, cannot, for some unknown reason, exercise the rights of belligerents, although the revolutionary party may. Being sovereign, he can exercise only sovereign rights over the other party. The insurgent may be killed on the battle-field or by the executioner; his property on land may be confiscated under the municipal law; but the commerce on the ocean, which supplies the rebels with means to support the war, cannot be made the subject of capture under the laws of war, because it is "*unconstitutional!!!*" Now, it is a proposition never doubted, that the belligerent party who claims to be sovereign, may exercise both belligerent and sovereign rights, (see 4 Cr., 272.) Treating the other party as a belligerent and using only the milder modes of coercion which the law of nations has introduced to mitigate the rigors of war, cannot be a subject of complaint by the party to whom it is accorded as a grace or granted as a necessity. We have shown that a civil war such as that now waged between the Northern and Southern States is properly conducted according to the humane regulations of public law as regards capture on the ocean.

Under the very peculiar Constitution of this Government, although the citizens owe supreme allegiance to the Federal Government, they owe also a qualified allegiance to the State in which they are domiciled. Their persons and property are subject to its laws.

Hence, in organizing this rebellion, they have *acted as States* claiming to be sovereign over all persons and property within their respective limits, and asserting a right to absolve their citizens from their allegiance to the Federal Government. Several of these States have combined to form a new confederacy, claiming to be acknowledged by the world as a sovereign State. Their right to do so is now being decided by wager of battle. The ports and territory of each of these States are held in hostility to the General Government. It is no loose, unorganized insurrection, having no defined boundary or possession. It has

a boundary marked by lines of bayonets, and which can be crossed only by force—south of this line is enemies' territory, because it is claimed and held in possession by an organized, hostile and belligerent power.

All persons residing within this territory whose property may be used to increase the revenues of the hostile power are, in this contest, liable to be treated as enemies, though not foreigners. They have cast off their allegiance and made war on their Government, and are none the less enemies because they are traitors.

But in defining the meaning of the term "enemies' property," we will be led into error if we refer to Fleta and Lord Coke for their definition of the word "enemy." It is a technical phrase peculiar to prize courts, and depends upon principles of public policy as distinguished from the common law.

Whether property be liable to capture as "enemies' property" does not in any manner depend on the personal allegiance of the owner. "It is the illegal traffic that stamps it as 'enemies' property.' It is is of no consequence whether it belongs to an ally or a citizen. 8 Cr., 384. The owner, *pro hac vice*, is an enemy." 3 Wash. C. C. R., 183.

The produce of the soil of the hostile territory, as well as other property engaged in the commerce of the hostile power, as the source of its wealth and strength, are always regarded as legitimate prize, without regard to the domicil of the owner, and much more so if he reside and trade within their territory.

III. We now proceed to notice the facts peculiar to the several cases submitted for our consideration. The principles which have just been stated apply alike to all of them.

I. The case of the brig Amy Warwick.

This vessel was captured upon the high seas by the United States gunboat Quaker City, and with her cargo was sent into the district of Massachusetts for condemnation. The brig was claimed by David Currie and others. The cargo consisted of coffee, and was claimed, four hundred bags by Edmund Davenport & Co. and four thousand seven hundred bags by Dunlap Moncure & Co. The title of these parties as respectively claimed

was conceded. All the claimants at the time of the capture, and for a long time before, were residents of Richmond, Va., and were engaged in business there. Consequently, their property was justly condemned as "enemies' property."

The claim of Phipps & Co. for their advance was allowed by the Court below. That part of the decree was not appealed from and is not before us. The case presents no question but that of enemies' property.

The decree below is affirmed with costs.

II. The case of the Hiawatha.

The Court below in decreeing against the claimants proceeded upon the ground that the cargo was shipped after notice of the blockade.

The fact is clearly established, and if there were no qualifying circumstances, would well warrant the decree. But after a careful examination of the correspondence of the State and Navy Departments, found in the record, we are not satisfied that the British Minister erred in the construction he put upon it, which was that a license was given to all vessels in the blockaded ports to depart with their cargoes within fifteen days after the blockade was established, whether the cargoes were taken on board before or after the notice of the blockade. All reasonable doubts should be resolved in favor of the claimants. Any other course would be inconsistent with the right administration of the law and the character of a just Government. But the record discloses another ground upon which the decree must be sustained. On the 19th of April the President issued a proclamation announcing his intention to blockade the ports of the several States therein named.

On the 27th of April he issued a further proclamation announcing his intention to blockade the ports of Virginia and North Carolina in addition to those of the States named in the previous one. On the 30th of April Commodore Pendergrast issued his proclamation announcing the blockade as established. These proclamations were communicated to the British Minister as soon as they were issued. On the 5th of May the British Consul at Richmond wrote to Lord Lyons that he had advised

those representing the owners of the Hiawatha that there would be no difficulty in her leaving in ballast. He added, "*but to this they will not consent.*" On the 8th of May Lord Lyons made an application to the Secretary of State relative to this vessel. The matter was referred to the Navy Department. On the same day the Secretary of the Navy replied: "Fifteen days have been specified as a limit for neutrals to leave the ports *after actual blockade has commenced*, with or without cargo, and there are yet five or six days for neutrals to leave: with proper diligence on the part of persons interested *I see no reason for exemption to any.*" Here was a distinct warning that the vessel must leave within the time limited, *after the commencement of the blockade.* On the 10th of May she completed the discharge of her cargo.

On the next day she commenced lading for her outer voyage, and by working night and day, on the 15th of May she had taken in a full cargo of cotton and tobacco. On that day the British Consul gave her a certificate, wherein he referred to the proclamation of the 27th of April, "in which it was announced that a blockade would be enforced of the ports of Virginia," and added, that "the best information attainable" "pointed to the 2d of May as the day when an efficient blockade was supposed to have been established."

On the 16th of May she was ready for sea, but there was no steam-tug in port to tow her down the river. At six o'clock, P. M., on the 17th she was taken in tow by the steam-tug David Currie. The tug had not sufficient power and the Hiawatha came to anchor again. On the 18th, at six o'clock, A. M., she was taken in tow by the steam-tug William Allison and towed out to sea. On the 20th of May she was captured in Hampton Roads off Fortress Monroe, and taken with her cargo into the Southern District of New York for condemnation.

The energy with which the labor of lading her was pressed evinces the consciousness of those concerned of the peril of delay beyond the time limited by the proclamation for her departure. The time was fifteen days *from the establishment of the blockade.* The blockade was effectual on the 30th of April.

There is no controversy upon the subject. The fifteen days

expired on the 15th of May—the day she completed her lading. A vessel being in a blockaded port is presumed to have notice of the blockade as soon as it commences. This is a settled rule in the law of nations.

The certificate of the Consul states, that according to his information the blockade commenced on the 2d of May. It is not easy to imagine how he could have arrived at this conclusion. The James river is a great commercial thoroughfare. It would seem that news of so important an event must have swept up its waters to Richmond, as news of interest spreads along the streets of a city. Such circumstances must have immediately become known to the parties as were sufficient to put them upon inquiry, and were therefore equivalent to full notice. But, conceding the 2d of May to be the day from which the computation is to be made, then, the fifteen days expired on the 17th of May. Her voyage down the river was not effectively begun until the 18th of May. This was after the expiration of the time allowed. In either view she became delinquent, and was guilty of a breach of the blockade. The proclamation allowed fifteen days—not fifteen days, *and until a steam-tug could be procured.* The difficulty of procuring a tug was one of the accidents which must have been foreseen and should have been provided for. Those concerned, notwithstanding the warnings they received, in their eagerness to realize the profits of a full cargo, took the hazards of the adventure and must now bear the consequences. If she could overstay the time limited for a short period she could for a long one. Whatever the excess of time, the principle involved is the same.

It is insisted for the claimants that according to the President's proclamation on the 19th of April, the Hiawatha was not liable to capture, until "the commander of one of the blockading vessels" had "duly warned" her, endorsed "on her register the date and fact of such warning," and she had again attempted "to leave the blockaded port." To this proposition there are several answers:

1st. There is no such provision in the proclamation of the 27th of April touching *the ports of Virginia.*

It simply announces that a blockade of those ports would be established.

2d. The proclamation of Commodore Pendergrast limits the warning to those who should approach the line of the blockade in ignorance of its existence. This action of the naval commander has not been disavowed by his Government, and is conclusive in a Prize Court. The warning proposed by this proclamation is according to the law of nations, and it is all that the law requires.

3d. If the provision referred to in the Proclamstion of the 19th of April be applicable to the ports of Virginia, it must be considered in the light of the surrounding circumstances.

It was intended for the benefit of the innocent, not of the guilty. It would be absurd to warn parties who had full previous knowledge. According to the construction contended for, a vessel seeking to evade the blockade might approach and retreat any number of times, and when caught her captors could do nothing but warn her and endorse the warning upon her registry. The same process might be repeated at every port on the blockaded coast. Indeed, according to the literal terms of the proclamation, the Alabama might approach, and if captured, insist upon the warning and endorsement of her registry, and then upon her discharge. A construction drawing after it consequences so absurb, is a "*felo de se.*"

The cargo must share the fate of the vessel.

The decree below is affirmed with costs.

III. The case of the Brilliante, No. 134, presents but little difficulty. This was a Mexican vessel, with a cargo belonging to Mexican citizens, seized on the 23d of June, 1861, in Biloxi Bay, in an attempt to escape from New Orleans by running the blockade, which had been established there by an efficient force on the 15th of May preceding. She was carried by the captors to Key West, where she was libelled in the District Court of the United States for the Southern District of Florida, and condemned with her cargo as prize of war.

From the deposition of Don Rafael Preciat, who was part owner of the vessel and partner in the ownership of the cargo

and also was on board from the time she left her home port at Campeche until her capture, the following facts may be gathered.

In approaching New Orleans with a cargo from Sisal, she found the United States ship-of-war Brooklyn blockading the mouth of the Mississippi River at Pass a Loutre, and was by the officer of that vessel informed of the blockade and forbid to enter. The witness had a son at Spring Hill College, near Mobile, whom he desired to get away; and the Commander of the Brooklyn gave him a letter to the Commander of the Niagara, recommending that he should be permitted to land and get his son. On leaving the Brooklyn she started along the coast in the direction of the Niagara, but instead of seeking that vessel, she evaded her, and went to New Orleans by way of Lake Ponchartrain. At New Orleans she discharged her cargo and took in another, and in attempting to escape by the way she intended, was captured as already stated.

Some attempt has been made to excuse her entrance to New Orleans by showing that the crew refused to proceed towards Mobile; but this is immaterial, as her condemnation is not for her successful entrance, but for her unsuccessful attempt to escape.

It is also urged that she was entitled to warning at the time of her capture, by virtue of the provision in the President's proclamation establishing the blockade. But whatever may be the sound construction of that provision in reference to warning vessels in its application to vessels which had notice of the blockade, the question does not arise in this case; because, from the statement of the owner of the vessel himself, she was warned by the officer of the Brooklyn.

The fact that the vessel's register was not produced by either party to show a warning endorsed on it, can make no difference. It cannot be supposed that such endorsement on the ship's register is to be the only evidence of warning; for if this were admitted, the vessel would only have to destroy her register, and with it the only evidence in which she could be condemned, or she would only need to keep several registers and destroy the one having the endorsement.

We entertain no doubt that this vessel and cargo were justly

condemned as neutral property for running the blockade, of which she had been fairly warned, and which she had once successfully violated.

The judgment is therefore affirmed.

The case of the Crenshaw, No. 163, on the other hand presents the question of "enemies' property," pure and simple. This vessel was seized in Hampton Roads on the 17th of May, 1861, by the blockading force at that point under flag-officer Stringham, and was carried as a prize of war into New York. The vessel and the larger part of the cargo were, at the time of the capture, owned by citizens of the State of Virginia, residing in Richmond; and the vessel had on board, among her papers, a clearance signed on the 14th of May by R. H. Lortin, Collector of the Port of Richmond, of the Confederate States of America.

Upon the principles already settled, the vessel and such parts of her cargo as came within the description of enemies' property, were rightfully condemned. It is however claimed that ten tierces of tobacco strips shipped by Ludlam & Watson at Richmond, to be delivered to shipper's order at Liverpool, and thirty tierces of tobacco strips shipped by W. O. Clark at Richmond, to order of Messrs, Sam'l Irven or assigns, Liverpool, are not enemies' property, and should be restored to claimants.

The claim for the ten tierces, as interposed by Henry Ludlam in behalf of himself and others, and the statement of the claimant's petition, are sworn to by Gustave Henikin, who holds the bill of lading, which is endorsed—"deliver to Ludlam & Henikin, for Chas. Lear & Sons', Liverpool. Ludlam & Watson."

Mr. Henikin states that his partner, Henry Ludlam, was in Europe, that Watson, (the partner of Ludlam & Watson, resident in Richmond,) was out of the jurisdiction of the Court, and that his knowledge of the facts embraced in the petition is derived from his connections with it as partner of Ludlam, and from correspondence and business relations with the shippers. The extent of his knowledge thus set forth is not very satisfactory nor is the claim stated in a manner to relieve it of any embarrassment growing out of this fact. He sets forth substantially that Ludlam & Watson, the shippers, was a firm composed of

Henry Ludlam, a citizen and resident of Rhode Island, and G. F. Watson, a citizen and resident of Richmond, Va., doing business in Richmond; and that Henry Ludlam was also doing business in New York in partnership with Gustave Henikin, under the style of Ludlam & Henikin, and that Lear & Sons were a mercantile partnership, composed of British subjects, residing in Liverpool. Then, speaking in behalf of all these parties, the petitioner says, they are owners of the ten tierces of tobacco, and *bona fide* owners of the bill of lading for the same, and that said tobacco was from the time of the shipment on board of the Crenshaw in the Port of Richmond, and still is the property of the claimants.

It will be seen at once, that the statement does not profess to set out what are the distinct interests of each individual in this property, nor the separate interests of the three partnership firms thus claiming it. Nor is there any attempt to show how any person beside Ludlam & Watson of Richmond, who were the shippers, acquired any interest in it. It is a joint claim on the part of all the persons mentioned, all of whom are asserted to be *bona fide* holders of the bill of lading. It is perfectly consistent with all that was stated, that Ludlam & Watson were the real owners of the property. The bill of lading, which is to shipper's order or assigns, throws no light on the subject, and there is not a particle of other testimony in reference to the claim in the record. The Court decreed that the interest of Lear & Sons in the ten tierces of tobacco be restored to them and that they pay costs, unless they furnished further proof that the property was *bona fide* neutral. They failed to furnish better proof and appealed on account of the costs.

We are of the opinion that the decree does them no injustice, and in the doubtful circumstances in which this claim stands, on their own statement, should have had great hesitation in giving them the property if the captors had appealed.

In reference to the claim of Ludlam, we are not sufficiently advised of what it is by his pleading or by the proof, to set apart for him, if it were just. But we are of the opinion that the firm of Ludlam & Watson, doing business in Richmond, where

Watson, the active member of the firm, resided, must be ruled by his status in reference to the property of the firm under his control in the enemy country.

The property was, through his residence in that country, subjected to the power of the enemy, and comes within the category of "enemies' property."

There is more difficulty in reference to the claim of Irvin & Co. to the thirty tierces of tobacco strips.

It very clearly appears that Irvin & Co., claimants, purchased this tobacco before the war broke out, with their own means, which were then in Richmond, and that they are citizens and residents of New York.

It is claimed that the property should be condemned on the ground that the transaction constitutes an illegal traffic with the enemy. This certainly cannot be held to apply to the purchase of the tobacco, which was bought and paid for before hostilities commenced. If it is intended to apply the principle of illegal traffic to the attempt to withdraw the property from the enemy country, it would seem that the order of the Secretary of the Navy allowing fifteen days for all vessels to withdraw from the blockaded ports, with or without cargo, should be held to apply to the property of one of our own citizens, residing in New York, already bought and paid for, as well as to any neutral cargo. If this be correct, it would seem that the property of Irvin & Co. should be restored to them as that of Laurie, Son & Co. was.

The right of Scott & Clarke to commissions on profits really constituted no interest in the property, and presents no cogni zable feature in the case.

This property will therefore be restored to the claimants.

Mr. Justice NELSON, dissenting. The property in this case, vessel and cargo, was seized by a Government vessel on the 20th of May, 1861, in Hampton Roads, for an alleged violation of the blockade of the ports of the State of Virginia. The Hiawatha was a British vessel and the cargo belonged to British subjects. The vessel had entered the James River before the blockade, on

her way to City Point, upwards of one hundred miles from the mouth, where she took in her cargo. She finished loading on the 15th of May, but was delayed from departing on her outward voyage till the 17th for want of a tug to tow her down the river. She arrived at Hampton Roads on the 20th, where, the blockade in the meantime having been established, she was met by one of the ships and the boarding officer endorsed on her register, "ordered not to enter any port in Virginia, or south of it." This occurred some three miles above the place where the flag ship was stationed, and the boarding officer directed the master to heave his ship to when he came abreast of the flag ship, which was done, when she was taken in charge as prize.

On the 30th April, flag officer Pendergrast, U. S. ship Cumberland, off Fortress Monroe, in Hampton Roads, gave the following notice: "All vessels passing the capes of Virginia, coming from a distance and ignorant of the proclamation, (the proclamation of the President of the 27th of April that a blockade would be established,) will be warned off; and those passing Fortress Monroe will be required to anchor under the guns of the fort and subject themselves to an examination."

The Hiawatha, while engaged in putting on board her cargo at City Point, became the subject of correspondence between the British Minister and the Secretary of State, under date of the 8th and 9th of May, which drew from the Secretary of the Navy a letter of the 9th, in which, after referring to the above notice of the flag officer Pendergrast, and stating that it had been sent to the Baltimore and Norfolk papers, and by one or more published, advised the Minister that fifteen days had been fixed as a limit for neutrals to leave the ports after an actual blockade had commenced, with or without cargo. The inquiry of the British Minister had referred not only to the time that a vessel would be allowed to depart, but whether it might be ladened within the time. This vessel, according to the advice of the Secretary would be entitled to the whole of the 15th of May to leave City Point, her port of lading. As we have seen, her cargo was on board within the time, but the vessel was

delayed in her departure for want of a tug to tow her down the river.

We think it very clear upon all the evidence that there was no intention on the part of the master to break the blockade, that the seizure under the circumstances was not warranted, and upon the merits that the ship and cargo should have been restored.

Another ground of objection to this seizure is, that the vessel was entitled to a warning endorsed on her papers by an officer of the blockading force, according to the terms of the proclamation of the President; and that she was not liable to capture except for the second attempt to leave the port.

The proclamation, after certain recitals, not material in this branch of the case, provides as follows: the President has "deemed it advisable to set on foot a blockade of the ports within the States aforesaid, (the States referred to in the recitals,) in pursuance of the laws of the United States and of the law of nations, in such case made and provided." "If, therefore, with a view to violate such blockade, a vessel shall approach or shall attempt to leave either of said ports, she will be duly warned by the commander of one of the blockading vessels, who will endorse on her register the fact and date of such warning, and if the same vessel shall again attempt to enter or leave the blockaded port, she will be captured and sent to the nearest convenient port for such proceedings against her and her cargo, as prize, as may be deemed advisable."

The proclamation of the President of the 27th of April extended that of the 19th to the States of Virginia and North Carolina.

It will be observed that this warning applies to vessels attempting to enter or leave the port, and is therefore applicable to the Hiawatha.

We must confess that we have not heard any satisfactory answer to the objection founded upon the terms of this proclamation.

It has been said that the proclamation, among other grounds, as stated on its face, is founded on the "law of nations," and

hence draws after it the law of blockade as found in that code, and that a warning is dispensed with in all cases where the vessel is chargeable with previous notice or knowledge that the port is blockaded. But the obvious answer to the suggestion is, that there is no necessary connection between the authority upon which the proclamation is issued and the terms prescribed as the condition of its penalties or enforcement, and, besides, if founded upon the law of nations, surely it was competent for the President to mitigate the rigors of that code and apply to neutrals the more lenient and friendly principles of international law. We do not doubt but that considerations of this character influenced the President in prescribing these favorable terms in respect to neutrals; for, in his message a few months later to Congress, (4th of July,) he observes: "a proclamation was issued for closing the ports of the insurrectionary districts" (not by blockade, but) "by proceedings *in the nature of a blockade*."

This view of the proclamation seems to have been entertained by the Secretary of the Navy, under whose orders it was carried into execution. In his report to the President, 4th July, he observes, after referring to the necessity of interdicting commerce at those ports where the Government were not permitted to collect the revenue, that "in the performance of this domestic municipal duty the property and interests of foreigners became, to some extent, involved in our home questions, and with a view of extending to them every comity that circumstances would justify, the rules of blockade were adopted, and, as far as practicable, made applicable to the cases that occurred under this embargo or non-intercourse of the insurgent States. The commanders, he observes, were directed to permit the vessels of foreigners to depart within fifteen days as in case of actual effective blockade, and their vessels were not to be seized unless they attempted, after having been once warned off, to enter an interdicted port in disregard of such warning."

The question is not a new one in this Court. The British Government had notified the United States of the blockade of certain ports in the West Indies, but "not to consider blockades as existing, unless in respect to particular ports which may be

actually invested, and, then, not to capture vessels bound to such ports, unless they shall have been previously warned not to enter them."

The question arose upon this blockade in *Mar. In. Co.* vs. *Woods*, (6 Cranch, 29.)

Chief Justice Marshall, in delivering the opinion of the Court, observed, "The words of the order are not satisfied by any previous notice which the vessel may have obtained, otherwise than by her being warned off. This is a technical term which is well understood. It is not satisfied by notice received in any other manner. The effect of this order is, that a vessel cannot be placed in the situation of one having notice of the blockade until she is warned off. It gives her a right to inquire of the blockading squadron, if she shall not receive this warning from one capable of giving it, and, consequently, dispenses with her making that inquiry elsewhere. While this order was in force a neutral vessel might lawfully sail for a blockaded port, knowing it to be blockaded, and being found sailing towards such port, would not constitute an attempt to break the blockade until she should be warned off."

We are of opinion, therefore, that, according to the very terms of the proclamation, neutral ships were entitled to a warning by one of the blockading squadron and could be lawfully seized only on the second attempt to enter or leave the port.

It is remarkable, also, that both the President and the Secretary, in referring to the blockade, treat the measure, not as a blockade under the law of nations, but as a restraint upon commerce at the interdicted ports under the municipal laws of the Government.

Another objection taken to the seizure of this vessel and cargo is, that there was no existing war between the United States and the States in insurrection within the meaning of the law of nations, which drew after it the consequences of a public or civil war. A contest by force between independent sovereign States is called a public war; and, when duly commenced by proclamation or otherwise, it entitles both of the belligerent parties to all the rights of war against each other, and as respects

neutral nations. Chancellor Kent observes, "Though a solemn declaration, or previous notice to the enemy, be now laid aside, it is essential that some formal public act, proceeding directly from the competent source, should announce to the people at home their new relations and duties growing out of a state of war, and which should equally apprize neutral nations of the fact, to enable them to conform their conduct to the rights belonging to the new state of things." "Such an official act operates from its date to legalize all hostile acts, in like manner as a treaty of peace operates from its date to annul them." He further observes, "as war cannot lawfully be commenced on the part of the United States without an act of Congress, such act is, of course, a formal notice to all the world, and equivalent to the most solemn declaration."

The legal consequences resulting from a state of war between two countries at this day are well understood, and will be found described in every approved work on the subject of international law. The people of the two countries become immediately the enemies of each other—all intercourse commercial or otherwise between them unlawful—all contracts existing at the commencement of the war suspended, and all made during its existence utterly void. The insurance of enemies' property, the drawing of bills of exchange or purchase on the enemies' country, the remission of bills or money to it are illegal and void. Existing partnerships between citizens or subjects of the two countries are dissolved, and, in fine, interdiction of trade and intercourse direct or indirect is absolute and complete by the mere force and effect of war itself. All the property of the people of the two countries on land or sea are subject to capture and confiscation by the adverse party as enemies' property, with certain qualifications as it respects property on land, (*Brown* vs. *United States*, 8 Cranch, 110,) all treaties between the belligerent parties are annulled. The ports of the respective countries may be blockaded, and letters of marque and reprisal granted as rights of war, and the law of prizes as defined by the law of nations comes into full and complete operation, resulting from maritime captures *jure belli*. War also effects a change in the

mutual relations of all States or countries, not directly, as in the case of the belligerents, but immediately and indirectly, though they take no part in the contest, but remain neutral.

This great and pervading change in the existing condition of a country, and in the relations of all her citizens or subjects, external and internal, from a state of peace, is the immediate effect and result of a state of war: and hence the same code which has annexed to the existence of a war all these disturbing consequences has declared that the right of making war belongs exclusively to the supreme or sovereign power of the State.

This power in all civilized nations is regulated by the fundamental laws or municipal constitution of the country.

By our Constitution this power is lodged in Congress. Congress shall have power "to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water."

We have thus far been considering the status of the citizens or subjects of a country at the breaking out of a public war when recognized or declared by the competent power.

In the case of a rebellion or resistance of a portion of the people of a country against the established government, there is no doubt, if in its progress and enlargement the government thus sought to be overthrown sees fit, it may by the competent power recognize or declare the existence of a state of civil war, which will draw after it all the consequences and rights of war between the contending parties as in the case of a public war. Mr. Wheaton observes, speaking of civil war, "But the general usage of nations regards such a war as entitling both the contending parties to all the rights of war as against each other, and even as respects neutral nations." It is not to be denied, therefore, that if a civil war existed between that portion of the people in organized insurrection to overthrow this Government at the time this vessel and cargo were seized, and if she was guilty of a violation of the blockade, she would be lawful prize of war. But before this insurrection against the established Government can be dealt with on the footing of a civil war, within the meaning of the law of nations and the Constitution

of the United States, and which will draw after it belligerent rights, it must be recognized or declared by the war-making power of the Government. No power short of this can change the legal status of the Government or the relations of its citizens from that of peace to a state of war, or bring into existence all those duties and obligations of neutral third parties growing out of a state of war. The war power of the Government must be exercised before this changed condition of the Government and people and of neutral third parties can be admitted. There is no difference in this respect between a civil or a public war.

We have been more particular upon this branch of the case than would seem to be required, on account of any doubt or difficulties attending the subject in view of the approved works upon the law of nations or from the adjudication of the courts, but, because some confusion existed on the argument as to the definition of a war that drew after it all the rights of prize of war. Indeed, a great portion of the argument proceeded upon the ground that these rights could be called into operation—enemies' property captured—blockades set on foot and all the rights of war enforced in prize courts—by a species of war unknown to the law of nations and to the Constitution of the United States.

An idea seemed to be entertained that all that was necessary to constitute a war was organized hostility in the district of country in a state of rebellion—that conflicts on land and on sea—the taking of towns and capture of fleets—in fine, the magnitude and dimensions of the resistance against the Government—constituted war with all the belligerent rights belonging to civil war. With a view to enforce this idea, we had, during the argument, an imposing historical detail of the several measures adopted by the Confederate States to enable them to resist the authority of the general Government, and of many bold and daring acts of resistance and of conflict. It was said that war was to be ascertained by looking at the armies and navies or public force of the contending parties, and the battles lost and won—that in the language of one of the learned counsel, "Whenever the situation of opposing hostilities has assumed the pro-

portions and pursued the methods of war, then peace is driven out, the ordinary authority and administration of law are suspended and war in fact and by necessity is the *status* of the nation until peace is restored and the laws resumed their dominion."

Now, in one sense, no doubt this is war, and may be a war of the most extensive and threatening dimensions and effects, but it is a statement simply of its existence in a material sense, and has no relevancy or weight when the question is what constitutes war in a legal sense, in the sense of the law of nations, and of the Constitution of the United States? For it must be a war in this sense to attach to it all the consequences that belong to belligerent rights. Instead, therefore, of inquiring after armies and navies, and victories lost and won, or organized rebellion against the general Government, the inquiry should be into the law of nations and into the municipal fundamental laws of the Government. For we find there that to constitute a civil war in the sense in which we are speaking, before it can exist, in contemplation of law, it must be recognized or declared by the sovereign power of the State, and which sovereign power by our Constitution is lodged in the Congress of the United States —civil war, therefore, under our system of government, can exist only by an act of Congress, which requires the assent of two of the great departments of the Government, the Executive and Legislative.

We have thus far been speaking of the war power under the Constitution of the United States, and as known and recognized by the law of nations. But we are asked, what would become of the peace and integrity of the Union in case of an insurrection at home or invasion from abroad if this power could not be exercised by the President in the recess of Congress, and until that body could be assembled?

The framers of the Constitution fully comprehended this question, and provided for the contingency. Indeed, it would have been surprising if they had not, as a rebellion had occurred in the State of Massachusetts while the Convention was in session, and which had become so general that it was quelled only by

calling upon the military power of the State. The Constitution declares that Congress shall have power "to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions." Another clause, "that the President shall be Commander-in-chief of the Army and Navy of the United States, and of the militia of the several States when called into the actual service of the United States;" and, again, "He shall take care that the laws shall be faithfully executed." Congress passed laws on this subject in 1792 and 1795. 1 United States Laws, pp. 264, 424.

The last Act provided that whenever the United States shall be invaded or be in imminent danger of invasion from a foreign nation, it shall be lawful for the President to call forth such number of the militia most convenient to the place of danger, and in case of insurrection in any State against the Government thereof, it shall be lawful for the President, on the application of the Legislature of such State, if in session, or if not, of the Executive of the State, to call forth such number of militia of any other State or States as he may judge sufficient to suppress such insurrection.

The 2d section provides, that when the laws of the United States shall be opposed, or the execution obstructed in any State by combinations too powerful to be suppressed by the course of judicial proceedings, it shall be lawful for the President to call forth the militia of such State, or of any other State or States as may be necessary to suppress such combinations; and by the Act 3 March, 1807, (2 U. S. Laws, 443,) it is provided that in case of insurrection or obstruction of the laws, either in the United States or of any State or Territory, where it is lawful for the President to call forth the militia for the purpose of suppressing such insurrection, and causing the laws to be executed, it shall be lawful to employ for the same purpose such part of the land and naval forces of the United States as shall be judged necessary.

It will be seen, therefore, that ample provision has been made under the Constitution and laws against any sudden and unexpected disturbance of the public peace from insurrection at home

or invasion from abroad. The whole military and naval power of the country is put under the control of the President to meet the emergency. He may call out a force in proportion to its necessities, one regiment or fifty, one ship-of-war or any number at his discretion. If, like the insurrection in the State of Pennsylvania in 1793, the disturbance is confined to a small district of country, a few regiments of the militia may be sufficient to suppress it. If of the dimension of the present, when it first broke out, a much larger force would be required. But whatever its numbers, whether great or small, that may be required, ample provision is here made; and whether great or small, the nature of the power is the same. It is the exercise of a power under the municipal laws of the country and not under the law of nations; and, as we see, furnishes the most ample means of repelling attacks from abroad or suppressing disturbances at home until the assembling of Congress, who can, if it be deemed necessary, bring into operation the war power, and thus change the nature and character of the contest. Then, instead of being carried on under the municipal law of 1795, it would be under the law of nations, and the Acts of Congress as war measures with all the rights of war.

It has been argued that the authority conferred on the President by the Act of 1795 invests him with the war power. But the obvious answer is, that it proceeds from a different clause in the Constitution and which is given for different purposes and objects, namely, to execute the laws and preserve the public order and tranquillity of the country in a time of peace by preventing or suppressing any public disorder or disturbance by foreign or domestic enemies. Certainly, if there is any force in this argument, then we are in a state of war with all the rights of war, and all the penal consequences attending it every time this power is exercised by calling out a military force to execute the laws or to suppress insurrection or rebellion; for the nature of the power cannot depend upon the numbers called out. If so, what numbers will constitute war and what numbers will not? It has also been argued that this power of the President from necessity should be construed as vesting him with the war

power, or the Republic might greatly suffer or be in danger from the attacks of the hostile party before the assembling of Congress. But we have seen that the whole military and naval force are in his hands under the municipal laws of the country. He can meet the adversary upon land and water with all the forces of the Government. The truth is, this idea of the existence of any necessity for clothing the President with the war power, under the Act of 1795, is simply a monstrous exaggeration; for, besides having the command of the whole of the army and navy, Congress can be assembled within any thirty days, if the safety of the country requires that the war power shall be brought into operation.

The Acts of 1795 and 1807 did not, and could not under the Constitution, confer on the President the power of declaring war against a State of this Union, or of deciding that war existed, and upon that ground authorize the capture and confiscation of the property of every citizen of the State whenever it was found on the waters. The laws of war, whether the war be civil or *inter gentes*, as we have seen, convert every citizen of the hostile State into a public enemy, and treat him accordingly, whatever may have been his previous conduct. This great power over the business and property of the citizen is reserved to the legislative department by the express words of the Constitution. It cannot be delegated or surrendered to the Executive. Congress alone can determine whether war exists or should be declared; and until they have acted, no citizen of the State can be punished in his person or property, unless he has committed some offence against a law of Congress passed before the act was committed, which made it a crime, and defined the punishment. The penalty of confiscation for the acts of others with which he had no concern cannot lawfully be inflicted.

In the breaking out of a rebellion against the established Government, the usage in all civilized countries, in its first stages, is to suppress it by confining the public forces and the operations of the Government against those in rebellion, and at the same time extending encouragement and support to the loyal people with a view to their co-operation in putting down the

insurgents. This course is not only the dictate of wisdom, but of justice. This was the practice of England in Monmouth's rebellion in the reign of James the Second, and in the rebellions of 1715 and 1745, by the Pretender and his son, and also in the beginning of the rebellion of the Thirteen Colonies of 1776. It is a personal war against the individuals engaged in resisting the authority of the Government. This was the character of the war of our Revolution till the passage of the Act of the Parliament of Great Britain of the 16th of George Third, 1776. By that act all trade and commerce with the Thirteen Colonies was interdicted and all ships and cargoes belonging to the inhabitants subjected to forfeiture as if the same were the ships and effects of open enemies. From this time the war became a territorial civil war between the contending parties, with all the rights of war known to the law of nations. Down to this period the war was personal against the rebels, and encouragement and support constantly extended to the loyal subjects who adhered to their allegiance, and although the power to make war existed exclusively in the King, and of course this personal war carried on under his authority, and a partial exercise of the war power, no captures of the ships or cargo of the rebels as enemies' property on the sea, or confiscation in Prize Courts as rights of war, took place until after the passage of the Act of Parliament. Until the passage of the act the American subjects were not regarded as enemies in the sense of the law of nations. The distinction between the loyal and rebel subjects was constantly observed. That act provided for the capture and confiscation as prize of their property as if the same were the property "of open enemies." For the first time the distinction was obliterated.

So the war carried on by the President against the insurrectionary districts in the Southern States, as in the case of the King of Great Britain in the American Revolution, was a personal war against those in rebellion, and with encouragement and support of loyal citizens with a view to their co-operation and aid in suppressing the insurgents, with this difference, as the war-making power belonged to the King, he might have recognized or declared the war at the beginning to be a civil war

which would draw after it all the rights of a belligerent, but in the case of the President no such power existed: the war therefore from necessity was a personal war, until Congress assembled and acted upon this state of things.

Down to this period the only enemy recognized by the Government was the persons engaged in the rebellion, all others were peaceful citizens, entitled to all the privileges of citizens under the Constitution. Certainly it cannot rightfully be said that the President has the power to convert a loyal citizen into a belligerent enemy or confiscate his property as enemy's property.

Congress assembled on the call for an extra session the 4th of July, 1861, and among the first acts passed was one in which the President was authorized by proclamation to interdict all trade and intercourse between all the inhabitants of States in insurrection and the rest of the United States, subjecting vessel and cargo to capture and condemnation as prize, and also to direct the capture of any ship or vessel belonging in whole or in part to any inhabitant of a State whose inhabitants are declared by the proclamation to be in a state of insurrection, found at sea or in any part of the rest of the United States. Act of Congress of 13th of July, 1861, secs. 5, 6. The 4th section also authorized the President to close any port in a Collection District obstructed so that the revenue could not be collected and provided for the capture and condemnation of any vessel attempting to enter.

The President's Proclamation was issued on the 16th of August following, and embraced Georgia, North and South Carolina, part of Virginia, Tennessee, Alabama, Louisiana, Texas, Arkansas Mississippi and Florida.

This Act of Congress, we think, recognized a state of civil war between the Government and the Confederate States, and made it territorial. The Act of Parliament of 1776, which converted the rebellion of the Colonies into a civil territorial war, resembles, in its leading features, the act to which we have referred. Government in recognizing or declaring the existence of a civil war between itself and a portion of the people in insurrection usually modifies its effects with a view as far as

practicable to favor the innocent and loyal citizens or subjects involved in the war. It is only the urgent necessities of the Government, arising from the magnitude of the resistance, that can excuse the conversion of the personal into a territorial war, and thus confound all distinction between guilt and innocence, hence the modification in the Act of Parliament declaring the territorial war.

It is found in the 44th section of the Act, which for the encouragement of well affected persons, and to afford speedy protection to those desirous of returning to their allegiance, provided for declaring such inhabitants of any colony, county, town, port, or place, at peace with his majesty, and after such notice by proclamation there should be no further captures. The Act of 13th of July provides that the President may, in his discretion, permit commercial intercourse with any such part of a State or section, the inhabitants of which are declared to be in a state of insurrection (§ 5), obviously intending to favor loyal citizens and encourage others to return to their loyalty. And the 8th section provides that the Secretary of the Treasury may mitigate or remit the forfeitures and penalties incurred under the act. The Act of 31st July is also one of a kindred character. That appropriates $2,000,000 to be expended under the authority of the President in supplying and delivering arms and munitions of war to loyal citizens residing in any of the States of which the inhabitants are in rebellion, or in which it may be threatened. We agree, therefore, that the Act 13th July, 1861, recognized a state of civil war between the Government and the people of the States described in that proclamation.

The cases of the *United States* vs. *Palmer*, (3 Wh., 610); *Divina Pastora*, and 4 Ibid, 52, and that class of cases to be found in the reports are referred to as furnishing authority for the exercise of the war power claimed for the President in the present case. These cases hold that when the Government of the United States recognizes a state of civil war to exist between a foreign nation and her colonies, but remaining itself neutral, the Courts are bound to consider as lawful all those acts which the new Government may direct against the enemy, and we

admit the President who conducts the foreign relations of the Government may fitly recognize or refuse to do so, the existence of civil war in the foreign nation under the circumstances stated.

But this is a very different question from the one before us, which is whether the President can recognize or declare a civil war, under the Constitution, with all its belligerent rights, between his own Government and a portion of its citizens in a state of insurrection. That power, as we have seen, belongs to Congress. We agree when such a war is recognized or declared to exist by the war-making power, but not otherwise, it is the duty of the Courts to follow the decision of the political power of the Government.

The case of *Luther* vs. *Borden et al.*, (7 How., 45,) which arose out of the attempt of an assumed new government in the State to overthrow the old and established Government of Rhode Island by arms. The Legislature of the old Government had established martial law, and the Chief Justice in delivering the opinion of the Court observed, among other things, that "if the Government of Rhode Island deemed the armed opposition so formidable and so ramified throughout the State as to require the use of its military force, and the declaration of martial law, we see no ground upon which this Court can question its authority. It was a state of war, and the established Government resorted to the rights and usages of war to maintain itself and overcome the unlawful opposition."

But it is only necessary to say, that the term "war" must necessarily have been used here by the Chief Justice in its popular sense, and not as known to the law of nations, as the State of Rhode Island confessedly possessed no power under the Federal Constitution to declare war.

Congress on the 6th of August, 1862, passed an Act confirming all acts, proclamations, and orders of the President, after the 4th of March, 1861, respecting the army and navy, and legalizing them, so far as was competent for that body, and it has been suggested, but scarcely argued, that this legislation on the subject had the effect to bring into existence an *ex post facto* civil war with all the rights of capture and confiscation, *jure*

belli, from the date referred to. An *ex post facto* law is defined, when, after an action, indifferent in itself, or lawful, is committed, the Legislature then, for the first time, declares it to have been a crime and inflicts punishment upon the person who committed it. The principle is sought to be applied in this case. Property of the citizen or foreign subject engaged in lawful trade at the time, and illegally captured, which must be taken as true if a confirmatory act be necessary, may be held and confiscated by subsequent legislation. In other words trade and commerce authorized at the time by acts of Congress and treaties, may, by *ex post facto* legislation, be changed into illicit trade and commerce with all its penalties and forfeitures annexed and enforced. The instance of the seizure of the Dutch ships in 1803 by Great Britain before the war, and confiscation after the declaration of war, which is well known, is referred to as an authority. But there the ships were seized by the war power, the orders of the Government, the seizure being a partial exercise of that power, and which was soon after exercised in full.

The precedent is one which has not received the approbation of jurists, and is not to be followed. See W. B. Lawrence, 2d ed. Wheaton's Element of Int. Law, pt. 4, ch. 1. sec. 11, and note. But, admitting its full weight, it affords no authority in the present case. Here the captures were without any Constitutional authority, and void; and, on principle, no subsequent ratification could make them valid.

Upon the whole, after the most careful consideration of this case which the pressure of other duties has admitted, I am compelled to the conclusion that no civil war existed between this Government and the States in insurrection till recognized by the Act of Congress 13th of July, 1861; that the President does not possess the power under the Constitution to declare war or recognize its existence within the meaning of the law of nations, which carries with it belligerent rights, and thus change the country and all its citizens from a state of peace to a state of war; that this power belongs exclusively to the Congress of the United States, and, consequently, that the President had no power to set on foot a blockade under the law of nations, and

that the capture of the vessel and cargo in this case, and in all cases before us in which the capture occurred before the 13th of July, 1861, for breach of blockade, or as enemies' property, are illegal and void, and that the decrees of condemnation should be reversed and the vessel and cargo restored.

Mr. Chief Justice TANEY, Mr. Justice CATRON and Mr. Justice CLIFFORD, concurred in the dissenting opinion of Mr. Justice Nelson.

APPLETON *vs.* BACON & NORTH.

Parties engaging the services of an inventor, under an agreement that he shall devote his ingenuity to the perfecting of a machine for their benefit, can lay no claim to improvements conceived by him after the expiration of such agreement.

This was an appeal from the Circuit Court for the District of Columbia.

On the 7th of December, 1858, the appellants, Appleton, filed their bill in the Circuit Court of the United States for the District of Columbia for an injunction to restrain the defendant, Bacon, from using, selling or trading with, or otherwise employing a certain patent right for a new and improved mode of folding paper invented by defendant, North, which had been issued by the Patent Office to the defendant, Bacon, on the 10th of August, 1858. And also from constructing or authorizing to be constructed any machine or machines, having or containing the said improvement, &c., as aforesaid patented to him, until the further order of the Court; that he be decreed to surrender and deliver up the said letters-patent to be cancelled, that they be declared void, and for general relief on the ground that the complainants were assignees of the invention, and the patent should have been issued to them, but the defendant Bacon, had fraudulently procured it to be issued to himself.

The defendant, North, admitted all the facts stated in the bill.